MISSISSIPPI LAW JOURNAL

ARTICLE

THESE UNLOVED MEN

Eugene C. Gerhart

COMMENTS

HISTORIC PRESERVATION AND THE ZONING POWER: A MISSISSIPPI PERSPECTIVE

THE SEVENTH AMENDMENT AND COMPLEX CIVIL LITIGATION: THE DEMISE OF THE COMPLEXITY EXCEPTION TO TRIAL BY JURY AND THE SEARCH FOR A VIABLE DUE PROCESS ALTERNATIVE

VOLUME 50 SEPTEMBER 1979 NUMBER 3

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1979-1980

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THESE UNLOVED MEN

*Eugene C. Gerhart**

"Woe unto you when all men shall speak well of you."

I. The Lawyer's Controversial Function in Society

"Those #*X§!!! Lawyers." That recent headline and cover story in *Time* magazine,[1] typifies the current criticism of—indeed hostility toward—lawyers. Such criticism is not new.

In Old Testament times litigants pleaded their own cases and lawyers were not needed.[2] The Old Testament prophet Habakkuk inveighed against the law's delays.[3] The scribes of ancient Israel were those whose function was to guard, transcribe and interpret the scriptures, including the Books of the Law. The word "lawyer" in the New Testament is generally regarded as referring to a scribe and was used interchangeably with the latter term by the Apostles.[4]

Christ himself did not hesitate to reproach the lawyers of his day in scathing language which modern lawyers frequently hear quoted to them: "Woe unto you also, ye lawyers! For ye lade men with burdens grievous to be borne and ye yourselves touch not the burdens with one of your fingers."[5] Yet the New

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* Partner, Coughlin & Gerhart, Binghamton, New York; A.B., 1934, Princeton University; L.L.B., 1937, Harvard University.

[1] *Those #*X§!!! Lawyers,* Time, April 10, 1978, at 56. Admiral Rickover has recently added his impressive voice to the chorus of criticism of lawyers, especially those dealing with the federal government and the Navy. *See* Rickover, *Lawyers Versus Society,* 61 J. Pat. Off. Soc'y 214, 216-19 (1979).

[2] *E.g.,* 1 *Kings* 3:16-28 (two women presented their own case before Solomon concerning their claim to be the mother of the same child). In another instance, Zelophehad's daughters argued and won their case to inherit property from their father. *Numbers* 27:1-7.

[3] *Habakkuk* 1:4 ("[T]he law is ignored and justice is never upheld . . . .") (New American Standard).

[4] Smith's Bible Dictionary 340 (1977) (the "lawyer" of *Matthew* 22:35 is called a "scribe" in the parallel passage of *Mark* 12:28).

[5] *Luke* 11:46 (King James). Luke recorded other statements by Jesus critical of "lawyers," the experts of the Mosaic law. Jesus admonished lawyers against hiding the truth from the people, not accepting it themselves, and preventing others from believing

Testament did not hesitate to describe Christ himself as "an advocate with the Father."[6] On one occasion, the apostles were released from prison because of the defense presented on their behalf by a "teacher of the law."[7]

It does not require a thorough review of history or literature to persuade anyone that lawyers—by definition representatives of adversary clients—are partisans. Partisans evoke emotions of fear and hatred, of respect and loyalty; but seldom are they viewed with personal objectivity and impartiality. Because life is not lived in Utopia, lawyers must by the very nature of their profession always be controversial.[8] Thus, lawyers have always been fair game.

In our American democratic society, however, the lawyer has not always been viewed with hostility. Alexis de Tocqueville unhesitatingly stated in the early nineteenth century that the legal profession in America was its only aristocracy.[9] Yet it is easy to see why laymen resent lawyers, and why books on how to avoid lawyers will always have a market.[10]

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it. *Id.* at verse 52. These accusations by Jesus led the ancient scribes and pharisees to lay in wait for Jesus to catch him making statements for which "they might accuse him." *Id.* at verses 53-54.

[6] *See* 1 *John* 2:1.

[7] *Acts* 5:34-41 (New American Standard). Another early Biblical example of counsel for the defense can be found in the Old Testament Apocrypha story of Daniel's clever cross-examination in defense of Suzanna. *See Daniel* 13:1-64 (Douay).

[8] Sir Thomas More's popular philosophical satire upon statecraft depicted the mythical ideal commonwealth of Utopia (meaning "nowhere"), a country which had but few laws:

> They have no lawyers among them, for they consider them as a sort of people whose profession it is to disguise matters and to wrest the laws; and therefore they think it is better that every man should plead his own cause, and trust it to the judge, as in other places the client trusts it to a counsellor.

More, *Ideal Commonwealths*, in THE WORLD'S GREATEST CLASSICS 72-73 (rev. ed. 1901).

Even though western civilization has nurtured a society of laws, there has never been a popular recognition of the value of attorneys' expertise. Dean Pound has noted that historically there has been antagonism between the citizenry and the legal profession. Pound, *Editorial: The Reader's Digest Article*, 15 NAACP L.J. 21, 21 (1955). Dick Butcher's famous "let's kill all the lawyers" is one of the most quoted of Shakespeare's lines. William Shakespeare, King Henry VI, Part II, Act IV, sc. ii.

[9] 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 278 (1945 ed.).

[10] Norman Dacey's book, *How to Avoid Probate*, is advertised as having sold over a million copies. HUMAN EVENTS, Feb. 3, 1979, at 20 (paid advertisement). The self-help idea is not new. *See, e.g.*, THE POCKET LAWYER AND FAMILY CONVEYANCER (1848) (author

More recently, the legal profession has been attacked by the judiciary and by the Department of Justice in new, unprecedented ways that have unmistakably affected the public image of the American lawyer. Once such adverse publicity is unleashed, it takes a long time for the truth and facts to catch up to falsehood and exaggeration.

United States Chief Justice Warren Burger, speaking at an American Bar Association conference at Columbia Law School in May, 1977, said that unless new ways are found to settle disputes, the country might be "overrun by hordes of lawyers hungry as locusts."[11] Earlier the same month, Chief Judge Breitel of New York State's highest court warned lawyers that "if lawyers just grab, grab, grab, they may be killing the goose that lays the golden egg."[12]

Chief Justice Burger later aroused the ire of American trial lawyers when, in testimony before a British commission, he placed the percentage of American lawyers competent in courtroom procedures at "somewhat near the middle number" between twenty-five and seventy-five percent.[13] As could be expected, this observation by the Chief Justice provoked a fierce backlash of criticism from the bar.[14] President Jimmy Carter joined the critics of the bar in generally denouncing the legal profession.[15] His comments also evoked condemnation of consid-

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unknown); EVERY MAN HIS OWN LAWYER OR THE CLERK AND MAGISTRATE'S ASSISTANT (1827) (author unknown). Today, "Divorce Yourself" kits are sold in New York State for those who want to act as their own lawyers in marital matters.

[11] N.Y. Times, May 28, 1977, at 1, col. 1. *See* Burger, *Let's Stop Building Major Cases out of Minor Disputes,* B. Leader, Sept.-Oct., 1977, at 2, 3, col. 1; N.Y. Times, Feb. 13, 1978, at B-9, col. 1.

[12] N.Y. Times, May 28, 1977, at 1, cols. 1, 3. The high cost of legal counseling and the increasing power of the legal profession over governmental affairs led to the creation of HALT, a citizens group the acronym for which stands for "Help Abolish Legal Tyranny." U.S. NEWS & WORLD REPORT, Nov. 13, 1978, at 116.

[13] N.Y. Times, Feb. 13, 1978, at B-9, col. 1; Burger, *supra* note 11, at 2, col. 2.

[14] *See, e.g.,* Bartto, *Chief Justice Burger's Remarks: A Disservice to the Administration of Justice,* 51 OHIO B. 53 (1978) (criticizing the remarks as being based upon informal and unsubstantial data); Bartlo, *The Crisis of Public Confidence in Lawyers,* 51 OHIO B. 281 (1978) (criticizing Burger's comments as doing irreparable harm to the legal profession in the public's eye); B. Leader, Jan.-Feb., 1978, at 7, col. 1.

[15] *See* N.Y. Times, May 5, 1978, at 1, col. 5 (President stated that 90% of the lawyers served only 10% of the people).

erable proportions from press columnists as well as from lawyers.[16]

After the furor of exaggerated charges dies down, some lingering truths still remain to haunt the bar. The law, unlike religion, ethics or morality, has a built-in bite which can be very painful. The bite of the law includes: (1) money damages; (2) injunctions; (3) punitive damages; (4) fines; (5) imprisonment; (6) contempt and (7) the ultimate penalty—the death sentence. In addition, many businessmen do not think highly of the way lawyers think, nor of the complicated procedures the law requires.[17] This attitude is complicated by the fierce passion for equality that prompts Americans to resent any aristocracy, including that group which de Tocqueville labeled the only aristocracy in America: the legal profession. Liberty-loving people also resent governmental authority and legal controls, even though the wise understand Locke's dictum: "where there is no law, there is no freedom."[18] Furthermore, plaintiffs who win their cases resent sharing their legal winnings with their lawyers. Plaintiffs and defendants who lose blame the law, the court—and their lawyers. Defendants who win believe that they were right all along and dislike paying a lawyer for proving what they "knew" all along. In every case, the lawyer is likely to be regarded as a necessary evil—but only after the case is over. There is also a historical, ecclesiastical dislike of the legal profession, probably because it wrested temporal power from the priests of a variety of sects over the centuries. Those ecclesiastics who appeal to a "higher law" criticize mere man-made law

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[16] *See, e.g.*, Schellhart, *President Carter's Enemies List*, Wall St. J., May 11, 1978, at 20, col. 4 (criticizing the President's statement as a political ploy to aid his sagging popularity); N.Y. Times, May 6, 1978, at 22, col. 1 (Carter's remarks labeled "simplistic populism"); Wall St. J., May 10, 1978, at 24, col. 1 (noting the hypocrisy in Carter's denouncing of the legal profession when Washington is the source of unnecessary laws and litigation); Wash. Post, May 11, 1978, at A-3, col. 4 (President's statement was made in a futile attempt to bolster his political image).

[17] *See* Goldstein, *Business and the Law*, N.Y. Times, Nov. 17, 1978, at D-4, col. 1 (attorneys are criticized for being reticent about weighing the risks and consequences of their legal advice); Omicinski, *Anderson Tells New Lawyers Bad Image is Self-Created*, Saturday Press, June 16, 1979, at 8-A, col. 1 (Binghamton, N.Y.) (Senator Warren M. Anderson lays the blame for the faltering public image of attorneys upon the legal profession).

[18] 2 J. LOCKE, OF CIVIL GOVERNMENT ch. VI, ¶ 57 (1924 ed.).

as being of a lower plane.[19] Finally, the bar has many self-inflicted wounds, including the admission of questionable candidates to its ranks and its failure to discipline adequately those who truly violate its widely proclaimed high ethical standards.[20]

Yet, for all its shortcomings, the legal profession in America will no doubt survive, for ours is a country that is built on law. United States Supreme Court Justice Robert H. Jackson summed it up cogently when he wrote: "I would say that if the businessmen could abolish all lawyers they would probably do it, except each fellow would save one. There is some individual lawyer which every businessman trusts with his deepest secrets."[21]

Lawyers are, by the very nature of their profession, representatives of individual clients, whether the client is a person, a corporation or the state itself. The lawyer, whether an advocate in court or counselor in his office, is obligated to be a partisan, faithful to his client and faithful to the law; but partisans create both friends and enemies. It is too much to expect the losing party in a lawsuit to give an unbiased opinion about the lawyer on the other side, or to expect him to think well of his own lawyer, who lost his case. One of the time-honored rights of a defeated client is to retire to a tavern to curse the judge who decided against him.

It is inherent in the very nature of an adversary system that lawyers cannot be universally liked. Any public relations program of the bar which has as its goal making lawyers popular is

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[19] Recent events in Iran show the passionate following that a fanatical religious leader can call forth in a theocratic state. The "divine right of Kings" can be traced from Hammurabi to the monarchs of England just a few centuries ago. The idea dies hard.

[20] Conviction of a felony will not always prevent entry to the bar. Alger Hiss, after being convicted of perjury and released from prison was readmitted to the Massachusetts Bar. A. WEINSTEIN, PERJURY: THE HISS-CHAMBERS CASE 562-64 (1978). Serving time in Attica or Sing Sing prisons is not a bar to obtaining a license to practice law in New York State. *See* Binghamton Press, April 1, 1979, at 1-D, col. 1.

Fraud in procuring admission to the bar and cohabitation outside of marriage after being admitted to the bar will not result in explusion from the bar. *See, e.g., In re* Hyra, 15 N.J. 252, 104 A.2d 609, 610-11 (1954) (attorney who failed to reveal prior convictions to the character and fitness committee of the state bar was suspended from practice for two years); Cord v. Gibb, 219 Va. 1019, 254 S.E.2d 71, 73 (1979) (an unmarried woman is not morally unfit to practice law merely because she lives with a man who is not her husband).

[21] E. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 63 (1958).

doomed in advance to failure.

There are many reasons for antagonism toward lawyers. Many rules and maxims of the law are widely thought not to be true, or even desirable. Many people, even in our liberty-loving society, do not believe it is good social policy that "ninety guilty men escape rather than that one innocent man be condemned." They ask: "How many innocent men have actually been executed in the United States?" The "not guilty" plea in a criminal case by an accused, who has been caught redhanded, is often thought by the public to be an outright lie rather than the legal plea of putting the state to the burden of proving the accused's guilt beyond a reasonable doubt. "Let the state prove its charge" would be a more understandable plea to laymen. That an accused "is presumed innocent until proved guilty" is another legal maxim with which laymen have difficulty, especially after a person has been indicted and charged with a crime. Why, asks the layman, must the indictment not be considered as evidence of guilt at his trial. The delays permitted by law and judges are also considered a serious weakness, a means by which a defendant prevents the plaintiff or the state from achieving justice. People overlook the fact that one party to any lawsuit—usually the defendant—would prefer that his case never come to trial. Many also fail to realize that the law is more than an ethical, moral or religious code. The law has teeth. The bite of the law hurts—and people do not like to be hurt. But in addition, the law gives the client the privilege of confidential communication with his lawyer, who cannot be required to reveal the content of such communication. However, many people regard this as an obstruction of justice, even though lawyers have been willing to go to jail to protect that privilege.[22] The conflict between the legally protected "right of privacy"[23] and the vociferous claim by

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[22] *See, e.g.*, Hickman v. Taylor, 329 U.S. 495, 512-13 (1947) (lower court abused its contempt powers by attempting to compel production for discovery of oral statements made by witness to counsel).

[23] *See* Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (statute forbidding the use of contraceptives violates the constitutional right of privacy). As early as three-quarters of a century before *Griswold*, the right "to be let alone" was asserted by commentators as a valuable right. *See* Brandeis & Warren, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890).

the media of an alleged "public's right to know" is not an issue that is easily settled.[24]

These intricate problems will continue to become more acute as the number of human beings on earth continues to multiply. When you multiply people, you multiply problems. The simpler laws that regulated 3,000,000 Americans in colonial times clearly needed adjustment and refinement over the ensuing two centuries. The law itself becomes more complex and, like any piece of complex machinery, requires fine-tuning and precise adjustment to perform its function well.

II. The Struggle for Law

Von Ihering declared that life itself is a struggle for law.[25] That struggle will produce more and more governmental regulation. Since the 1930's, our country has been moving away from the concept of independent, private management of business, whose goal was to make a legitimate profit as a just reward for work, efficiency and ingenuity. We have been replacing that ideal with the concept of the service state, whose goal is not profit, but power, and in which governmental regulation, not freedom, is the rule. C. Northcote Parkinson, famed for "Parkinson's Law," insists that in any public bureau the number of workers tends to rise at an annual rate of more than five percent, regardless of the amount of work to be done, or even whether any work is done. He claims that this occurs because: (1) an official wants to multiply subordinates, not rivals; and (2) officials make work for each other.[26] Those who doubt the valid-

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[24] *See* Merrill, *The "People's Right to Know" Myth*, 45 N.Y.St. B.J. 461 (1973). Merrill contends that the government, the press, and the people have an adversarial relationship that is healthy within a democracy. The people and the press do not have an absolute right to know governmental information in every case, but they do have the right to try to obtain that knowledge. *Id.* at 465-66.

[25] Von Ihering analyzed man's struggle to preserve law as follows:

> The end of the law is peace. The means to that end is war . . . . The life of the law is a struggle, a struggle of nations, of the state power, of classes, of individuals . . . . All the life in the world has been obtained by strife . . . . The maintenance of law and order by the state is nothing but a continual struggle against the lawlessness which violates them.

R. Von Ihering, The Struggle For Law 1-6 (1879).

[26] Miller, *President Carter v. Parkinson's Law*, Reader's Digest, April, 1977, at 59.

ity of his claim should look first at HEW, and second at the Department of Agriculture, which has one bureaucrat for every thirty-four farmers! Any state superintendent of insurance would immediately appoint a receiver for any insurance company if its financial statement showed that its unfunded liabilities exceeded its assets by the ratio of seventy-five to one, as that of our federal social security system does.[27]

How did we Americans get to this point? One reason is that there are, indeed, too many laws. Pogo's immortal words provide the second reason: "We have met the enemy and he is *us*." We are dealing today in our country and in our businesses with many diverse forces. The cause of the present malady is not a single, evil germ which, like polio, can be isolated and then eradicated overnight by some genius like Dr. Salk. Nevertheless, some of the causes that we should factor into our analysis of the present situation include the following.

First: We have a dual governmental system, state and federal, each sovereign in its respective sphere. Congress, federal agencies, state legislatures, counties, cities and their various departments, all rule us with regulations that have the coercive force of law. Every day more and more citizens look to government for protection, and thus invite—even demand—more regulation. This is a fundamental shift in our traditional American attitude which emphasized freedom and free enterprise.[28]

Second: The American ideal of equality of opportunity has been evolving subtly into the egalitarian goal of equality of reward. A major effort of government, under such rubrics as "human rights" and "civil rights," has been to funnel more of the benefits of society towards special-interest groups of alleg-

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[27] Bleiberg, *Farewell to Ponzi? Change Must Come to the Social Security System*, BARRON'S, Jan. 3, 1977, at 7. Donald S. MacNaughton, retiring Chairman of the Prudential Insurance Company has recently been quoted as expressing similar views. Thomas, *Executive's Advice to Congress on Financing Social Security*, N.Y. Times, March 24, 1978, at D-2, col. 7.

[28] Manning, *Too Much Law: Our National Disease*, 33 BUS. LAW. 435, 436-37 (1977). Today, government's traditional role of protecting free enterprise while maintaining an orderly society has been significantly altered because of the supervisory control exercised over business by an expanding governmental bureaucracy. Loevinger, *The Impact of Government Regulation*, 52 N.Y.ST. B.J. 94, 94 (1980) (author contends that the social costs of excessive governmental regulations outweigh their probable benefits).

edly disadvantaged people, including ethnic groups, lower-income groups, women, children, the elderly and the handicapped. This is done regardless of the work or productive capacity of these groups. This shift of benefits can take place only by passing more laws.

Third: Life involves major risks to everyone, including disability, unemployment, retirement and death. Once the individual was expected to meet these risks himself. Today, a substantial segment of the population believes that society as a whole should in some way compensate the individual for almost any loss he sustains. The idea of compensation regardless of fault is eroding the traditional American ideal of individual responsibility.[29] Is this a social good? It may or may not be; but in either case, to achieve it, more legal mechanisms are required.

Fourth: Due process is a sacred procedural concept to Americans, an outgrowth of the Magna Charta[30] enshrined in the fifth and fourteenth amendments. Due process embodies the American ideal of fair play.[31] Today, everybody has a constitutional right to proper notice; everybody can demand the right to be heard; everybody has a right to appeal. The tiny snail darter

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[29] No-fault automobile insurance is perhaps the best example of society's repudiation of the concept of individual responsibility. A no-fault insurance system would replace the existing adversarial system which emphasizes the negligence of an individual with a contractual system whereby the parties enter into an agreement establishing the payment of damages regardless of who is at fault. GILLESPIE & KLIPPER, NO-FAULT 12 (1972). For an analysis of the arguments for and against the no-fault system see AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, NO-FAULT AUTO INSURANCE PROPOSALS 14-31 (1971).

[30] Many of the "maxims of liberty and justice" in the Magna Charta were incorporated into the Bill of Rights, including the constitutional guarantee of due process of law:

> Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guarantee not particular forms of procedure, but the very substance of individual rights to life, liberty and property.

Hurtado v. California, 110 U.S. 516, 531-32 (1884) (jury conviction of first degree murder and imposition of sentence of death on the basis of information before magistrate without grand jury indictment held not violative of due process).

[31] *See, e.g.*, Hannah v. Larch, 363 U.S. 420, 442 (1960) (due procees embodies rules of fair play); Galvan v. Press, 347 U.S. 522, 530 (1954) (the essence of due process is the sense of fair play).

can delay or prevent the construction of a mighty dam.[32] This excessive procedural protection has so multiplied litigants and lawsuits that today Americans are accused of being "lawsuit happy." It is an implicit compliment to the judiciary of our country that Americans believe that the most effective way to settle any problem, from abortion to obscenity, is through judicial decision. We are the most litigious people in the world—which, when you think about it, does prove something about our faith in law, in judges, and, yes, even in lawyers.

Fifth: Lawmakers, with such sophisticated tools as computers and polls, are learning to manipulate the public and the voter for their own benefit.[33] It is an easy thing for politicians to play on the greed and envy of the poor, the handicapped, the unlucky, and the poorly-educated by attacking the "vested interests," "the rich," and "the lobbyists." The Robin Hood theory of government is not new. Yet these lawmakers often own shares of stock in those "vested interests" they denounce.

Legislators, too, are aware of the immortality that inheres in lawmaking. Who will forget the names of Mr. Sherman, Mr.

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[32] The plight of the snail darter represents an interesting chapter in the struggle between environmentalists and those advancing the construction of federal projects. The district court refused to grant a permanent injunction halting construction of the dam, reasoning that Congress did not intend the Endangered Species Act of 1973, 16 U.S.C. § 1531 (1976), to prevent the Tellico dam from being completed. Hill v. Tennessee Valley Auth., 419 F. Supp. 753, 760 (E.D. Tenn. 1976), *rev'd*, 549 F.2d 1064 (6th Cir. 1977), *aff'd*, 437 U.S. 153 (1978). The Court of Appeals for the Sixth Circuit reversed and granted the injunction, holding that "[i]t is conceivable that the welfare of an endangered species may weigh more heavily upon the public conscience . . . than the writeoff of those millions of dollars already expended for Tellico in excess of its present salvageable value." 549 F.2d 1064, 1074 (6th Cir. 1977), *aff'd.* 437 U.S. 153 (1978). In upholding the decision of the court of appeals, the Supreme Court refused to balance the loss of the $100,000,000 dam against the "incalculable value" of the snail darter. Tennessee Valley Auth. v. Hill, 437 U.S. 153, 194 (1978).

In response to the failure of the courts to recognize any flexibility in the Endangered Species Act, Congress adopted a procedure for exempting a federal agency from the strict terms of the Act. H.R. Rep. No. 95-1625, 95th Cong., 2d Sess. 3, *reprinted in* [1978] U.S. Code Cong. & Ad. News 9453, 9453. In empowering the Endangered Species Committee with the authority to exempt a project from the Act, Congress specifically cited the "snail darter case" as an example of the need for the use of discretion in applying the Act. *Id.* at 9460. *See* Endangered Species Act of 1978, Pub. L. No. 95-632, § 3, 92 Stat. 3752 (to be codified in 42 U.S.C. § 1536) (procedure established by which federal agencies may be exempted from the Act).

[33] *See* Wall St. J., March 15, 1978, at 1, col. 1.

Clayton, Mr. Wagner, Messrs. Taft and Hartley, and, of course, Mr. Mann?

Then there are self-generating laws like that impenetrable verbal jungle called the Internal Revenue Code, which itself constantly demands recodification and reform by the enactment of new laws.

Sixth: It is also easy to attack lawyers as a group, because lawyers, by their professional obligation, are required to represent all viewpoints, even the most unpopular ones. As a result, many choose to criticize the lawyer because he dares to express thoughts which are generally found offensive. In doing so, however, they attack the very basis of the first amendment's guarantee to every American of the right of free speech.

Each of us says he wants less regulation and less law. Yet every pressure group—business, ethnic, religious, educational and professional—wants something supported, or regulated, or banned by law. Our federal government, for instance, wants smoking curtailed although it subsidizes tobacco farmers. The inevitable result is an endless accumulation of inconsistent, often contradictory, laws.

The public today is aware of new problems that have become of more urgent importance in the last half of the twentieth century. These include pollution control, product safety and claims of minority groups to special treatment under the law. This new awareness creates for American businesses and their lawyers a dilemma. Public constituencies seek goals that conflict with or are diametrically opposed to traditional goals of American business. Business by its very nature seeks personal gain in the forms of profits, dividends, wages and benefits. Public interest groups seek public safety, pollution control, and the like, which can be achieved only by forcing businessmen by law to absorb higher costs.[34] Since business by law is entitled to operate at a fair profit—and indeed must achieve a profit in order to

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[34] A recent survey sample of 48 firms showed that the total incremental cost of governmental regulations came to $2.6 billion. This was equal to 16% of their income after taxes, or 10% of their capital expenditures. Of the six governmental agencies covered by the study (EPA, EEOC, OSHA, DOE, ERISA, and FTC) the EPA accounted for 75% of the total regulatory costs incurred. The EEOC was second with 8%. RESEARCH INSTITUTE OF AMERICA, RESEARCH INSTITUTE RECOMMENDATIONS § 1, at 4 (1979).

survive—the rational resolution of this conflict involves inevitable lawsuits, compromises and workable accommodations. The services of lawyers on both sides thus become necessary,[35] but the cry is raised that the nation suffers from a plague of lawyers.[36]

What is often overlooked, especially by the young, is that man is a social creature. Any society, be it of ants, bees, chimpanzees, aboriginees or more sophisticated groups of *homo sapiens,* must live according to certain rules which must be observed voluntarily or enforced regardless of some recalcitrant individuals' uncooperative attitudes. Each new generation acts as if "freedom" means the unbridled right to "do its own thing." It finds itself confronted, however, by a complex society whose very survival demands limitations on the rights and freedoms of individuals to pollute, to procreate, to consume and to ignore social duties. When we are confronted by a complex problem, it is easy to come up quickly with an answer that is simple, clear—and wrong. It is plainly simplistic to blame lawyers for all the nation's ills.[37] "The greatest challenge to the legal profession may be just this: To husband the uniqueness of the individual and his rights, in a society made up increasingly of complex entities and dehumanizing forces—and to gain and hold the respect of the populace for doing it."[38]

III. The Lawyer and His Public Relations Image

The advent of television has had a profound influence on modern life. Wars are fought on the TV screens in our living

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[35] *See* Palmieri, *From the Boardroom: Corporate Responsibility and the Competent Board,* Harv. Bus. Rev. May-June, 1979, 46, 47.

[36] *A Plague of Lawyers,* Harper's, Oct. 1976, at 37 (the ratio in the United States of one attorney to every 530 citizens is significantly higher than that of any country in the world).

[37] N.Y. Times, May 6, 1978, at 22, col. 1.

> The ordinary citizen is being cheated not simply by lawyers as such but by institutions, including those of government, for whom the fees of lawyers (and, while we are at it, the pay also of accountants, bookkeepers, file clerks, and telephone operators) are a normal cost of business, paid for in consumer prices and taxes.

Id. at cols. 1-2.

[38] Lesly, *Respect for the Law and Lawyers in an Age of Unrest,* 45 Ohio B. 1313, 1317 (1972).

rooms. Manipulation of news, information, advertisements and causes has an exciting and confusing effect on all of us. Exaggeration and calculated partial truths become means of provoking public reaction. Instant solutions, magic answers, and visceral dramatics tend to make the slower, more deliberate reasoning processes of the law appear antiquated. "Law is based on rules, like computers; TV is based on emotion. Law is based on history and tradition; TV on immediacy and novelty."[39] The media have increased the expectations of Americans for instant solutions to all problems of our society. Legal solutions based on investigation, reason and facts take time. People who get accustomed to instant solutions become frustrated when answers are slow in coming. Rising expectations will be frustrated in a society where multiplication of people is the rule. Inevitably, the law will be the scapegoat for every self-proclaimed disadvantaged person's failure to ascend the ladder of affluence. Few people take the time or effort to make the often subtle distinction between law and economics. Can the law or lawyers be expected to deliver the goods to meet this crescendo of Americans' economic hopes, goaded on as those hopes are by incessant advertising, the power of mass suggestion and credit card offers?[40]

What, then, are some of the attainable goals that lawyers and professional legal organizations should aim for in the last two decades of this century? What does a client have a right to expect realistically from his own lawyer? Almost every client wants the following standards of performance to be met by his lawyer: (1) highest quality legal work; (2) quick reaction time; (3) advice in plain, understandable English, not in esoteric legal jargon; (4) advice on how to reach his intended goal within the law, not a litany of reasons why he cannot do what he wants to do; and (5) solutions to his problems which reduce the risk of expensive lawsuits to a minimum. To achieve these standards, a lawyer ought to keep in mind that some things are legally per-

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[39] *Id.* at 1321.

[40] *See id.* at 1321-22. One solution may lie in toning down the expectations of each segment of the population while creating an awareness of and appreciation for those things that have been achieved. The legal system would be better accepted if the public's expectations were aligned with more realistic goals. *Id.* at 1322.

missible which are nonetheless morally reprehensible. Holmes warned the bar, "I fear that the bar has done its full share to exalt that most hateful of American words and ideals, 'smartness,' as against dignity of moral feeling and profundity of knowledge."[41] An old proverb tells us that to be too clever is stupid. The wisest man will occasionally pretend to be a "damn fool." The law is a human instrument designed to serve human ends, not a game of intellectual chess for lawyers and judges. When any law fails to serve the highest good of the people, they will surely change it. American law derives from the English common law which emphasized Anglo-Saxon notions of decency and fair play. Our Code of Professional Responsibility stresses the desirability of a lawyer's pointing out to his client those factors which lead to a decision that "is morally just as well as legally permissible."[42] Lincoln said it well when he wrote:

> There is a vague popular belief that lawyers are necessarily dishonest. I say vague, because when we consider to what extent confidence and honors are reposed in and conferred upon lawyers by the people, it appears improbable that their impression of dishonesty is very distinct and vivid. Yet the impression is common, almost universal. Let no young man choosing the law for a calling for a moment yield to the popular belief—resolve to be honest at all events; and if in your own judgment you cannot be an honest lawyer, resolve to be honest without being a lawyer. Choose some other occupation, rather than one in the choosing of which you do, in advance, consent to be a knave.[43]

The perennial problem of law is to maintain a proper balance between liberty and authority, to prevent liberty from becoming license and authority from becoming tyranny. That is an endless struggle. Whatever the shortcomings of lawyers may be, the power of lawyers as a class has always been a civilizing force in society. The influence of lawyers represents the triumph of

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[41] HOLMES, *The Use of Law Schools*, in SPEECHES 28, 32 (1934).

[42] ABA CANONS OF PROFESSIONAL ETHICS, ETHICAL CONSIDERATION 7-8. *See* Remarks by S. Shepherd Tate, President-Elect, American Bar Association, Cincinnati, Ohio Rotary Club (March 30, 1978).

[43] A. LINCOLN, *Notes for Law Lecture*, in 2 NICOLAY & HAY, COMPLETE WORKS OF ABRAHAM LINCOLN 143 (1905).

education and reason over the arbitrary whim of a dictator and over unbridled, brute force.[44] Justice Jackson, a country lawyer originally, wrote in a tribute that it was "from this brotherhood that America has drawn its statesmen and its judges. A free and self-governing Republic stands as a monument for the little known and unremembered as well as for the famous men of our profession."[45] Lawyers must not aspire to an image of public popularity. That is the goal of a politician, whose success depends on pleasing a constantly changing populace whose favor is as fickle as a weathervane. The lawyer's only attainable goal is *respect*. Respect is a rational assessment based upon approved performance and results attained. Respect is given even to worthy enemies.[46] Struggle is the rule of life, and if we want to survive we must fight unwarranted aggressions in order to maintain a proper, tolerable balance between competing forces. Lawyers are the warriors who help to achieve and maintain that workable equilibrium. They cannot expect to be liked by those they oppose. They can only hope to be respected for their courage, their competence, their integrity, their fidelity and their loyalty to the eternal ideal of justice for every man.

The legal profession cannot successfully *demand* respect from its clients or the public. Respect must be *earned*. History itself proves this point. The great documents of human freedom—the Magna Charta, the Declaration of Independence, our Constitution, the Bill of Rights—and the great legal decisions of our courts are all the products of lawyers' education, hard work,

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[44] Evershed, *Our Common Heritage of Law*, 27 N.Y.U.L. REV. 32, 32 (1952). Admiral Karl Doenitz, who surrendered the German military forces to the Allies at the end of World War II, has written:

> One lesson which is of vital importance with regard both to their [the German people's] assessment of past events and to their attitude towards the future, and that lesson is that the Fuehrerprinzip, the principle of dictatorship, as a political principle is false because human nature obviously is incapable of making good use of the power which the principle confers, without succumbing to the temptations of the abuse of power which is inherent in it.

Letter from Admiral Karl Doenitz to Eugene C. Gerhart (March 6, 1979).

[45] Jackson, *Tribute to Country Lawyers: A Review*, 30 A.B.A.J. 136, 139 (1944) (a review of A. Powell's, *I Can Go Home Again*).

[46] *E.g.*, O. W. HOLMES, MEMORIAL DAY, in THE OCCASIONAL SPEECHES OF JUSTICE OLIVER WENDELL HOLMES 4-5 (1962).

courage and integrity.[47]

The noted British historian, H.G. Wells, recognized that these unloved men—the lawyers—make an invaluable contribution to humanity, fighting to bring justice and reason to mankind's problems.[48]

How does a lawyer achieve the goal of earning respect? One of the greatest of America's law teachers, a master of legal science, was Edward H. Warren of the Harvard Law School. He stressed to law students that a satisfying lifetime at the bar usually requires four things: (1) a sound body; (2) a pleasing person-

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[47] Tocqueville has written, "I cannot believe that a republic could hope to exist at the present time if the influence of lawyers in public business did not increase in proportion the power of the people." 1 A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 276 (1945 ed.). Dean Pound would add to Tocqueville's observation that although an extension of the influence of attorneys in public affairs may protect the principles of an expanding republic, such an enlargement of the role of lawyers in society will be met with opposition.

> [T]he lawyer is the uncompromising and inveterate foe of absolutism. Absolutism all over the world and in every connection encounters the lawyer's demand that before any one's will is subjected to the will of another, before any one's claims or rights are disposed of, he shall have a full and fair hearing and be competently represented. Whenever there is a movement to substitute the will of someone for the law of the land, administered by persons brought up in administering and understanding the law of the land, you will find this opposition to lawyers.

Pound, *supra* note 8, at 28.

[48] Lawyer and judge are essentially men of the literate and devoted tradition with an element of authoritative aristocracy. No class has been so bitterly satirized and reviled, but the very bitterness of the abuse reveals a recognition that from this class it is natural and reasonable to demand a conscientiousness and self-suppression beyond the normal limits. The peasant who curses the lawyer for selling justice amd making all he can by it sells his own produce without compunction and makes all he can by it though other people starve. When every iniquity of the lawyers of the past has been admitted, we still find that there were abundant gentlemen of the long robe, haunted, even if they were not inspired and pervaded, by the spirit of righteousness. The illumination they shed may not always have been a beacon, but at any rate the wick never ceased altogether to glow, and down the centuries we see a succession of these unloved men boring away in their tedious frowsy courts, really struggling in that dim medieval light to import some semblance of justice, some thought for the commonwealth, into the limitless greed of robber barons, the unqualified imperatives of feudal chiefs and the grasping cunning of the baser sort. And they are still working to-day towards the satisfaction of this permanent social need—the exact definition of proprietary rights.

1 H. WELLS, THE WORK, WEALTH AND HAPPINESS OF MANKIND 352-53 (1931).

ality; (3) a good intellect; and (4) a character that inspires confidence. Then he added in a sentence the touchstone for success at the bar, the key to earning the respect of associates, of clients, and of mankind generally: "I know of no asset any man can have which will contribute so much to a legitimate and enduring success at the bar as the confidence of other people that he can be trusted always to do the decent thing."[49]

[49] Warren, *Effective Teaching Methods*, in SPARTAN EDUCATION 28 (1942). Senator Warren M. Anderson of New York recently stated that the keys to success for the lawyer are honesty, openness, candor and concern for the client. He added:

> Our attitude—that of a friend as well as that of a professional guide whose aim is to serve—will, in my opinion, do more than anything else to change the perception of those we represent. This is something that no one but the lawyer himself or herself can accomplish.

Address by Senator Warren M. Anderson, Albany Law School Commencement (June 9, 1979).

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COMMENTS

HISTORIC PRESERVATION AND THE ZONING POWER: A MISSISSIPPI PERSPECTIVE

Concern in America over the quality of life has never been greater. One area in which this concern has led to concrete action is historic preservation.[1] The fundamental operating principle of the preservationist movement is that the quality of life today is enhanced by the retention and continued use of structures standing as reminders of traditions, craftsmanship, and life styles of earlier eras. In the public arena, the preservationist focus has been upon federal, state, and local legislative programs for the protection and revitalization of historic areas and landmarks. This Comment will consider the role of zoning laws in historic preservation, with special emphasis being given to developments in Mississippi.

Although purchase by eminent domain or private initiative of historic or aesthetically significant sites plays a prominent

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[1] For a selective review of the field of historic preservation, the following sources should be consulted: 2 R. ANDERSON, AMERICAN LAW OF ZONING §§ 9.69-.75 (2d ed. 1976); J. COSTONIS, SPACE ADRIFT: LANDMARK PRESERVATION AND THE MARKETPLACE (1974); C. GREIFF, LOST AMERICA: FROM THE ATLANTIC TO THE MISSISSIPPI (1971); C. GREIFF, LOST AMERICA: FROM THE MISSISSIPPI TO THE PACIFIC (1972); J. MORRISON, HISTORIC PRESERVATION LAW (1965); 2 P. ROHAN, ZONING AND LAND USE CONTROLS §§ 7.01-.04 (1978); 3 N. WILLIAMS, AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 71 (1975 & Supp. 1977); Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93 (1976); Brenneman, *Techniques for Controlling the Surroundings of Historic Sites*, 36 L. & CONTEMP. PROB. 416 (1971); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Fowler, *Federal Historic Preservation Law: National Historic Preservation Act, Executive Order 11593, and Other Recent Developments in Federal Law*, 12 WAKE FOREST L. REV. 31 (1976); Gray, *The Response of Federal Legislation to Historic Preservation*, 36 L. & CONTEMP. PROB. 314 (1971); Pyke, *Architectural Controls and the Individual Landmark*, 36 L. & CONTEMP. PROB. 398 (1971); Wilson & Winkler, *The Response of State Legislation to Historic Preservation*, 36 L. & CONTEMP. PROB. 329 (1971); Comment, *Historic Preservation Cases: A Collection*, 12 WAKE FOREST L. REV. 227 (1976); Comment, *Legal Methods of Historic Preservation*, 19 BUFFALO L. REV. 611 (1970); Note, *Land Use Controls in Historic Areas*, 44 NOTRE DAME L. 379 (1969); Note, *The Police Power, Eminent Domain, and the Preservation of Historic Property*, 63 COLUM. L. REV. 708 (1963).

role in certain circumstances, the costs inherent in such approaches prevent their wide utilization.[2] Architectural controls through zoning laws[3] are, by comparison, the most cost-effective and widely employed of all preservationist methods.[4] Federal legislation, while highly significant to all aspects of historic preservation, has been adequately explored in numerous other places and will not be dealt with here.[5]

I. Zoning and Historic Preservation

A. *Introduction*

Zoning first emerged in Germany in the late 1800's, and by the 1920's zoning ordinances were widespread in the United States, reflecting the immense expansions and complex concerns of urban and suburban development. Though zoning law is in part derived from traditional nuisance law,[6] land-use regulations of this nature mark a substantial departure from traditional notions of private determination of property use.[7]

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[2] *See* 2 P. Rohan, *supra* note 1, § 7.01(1), at 7-7.

[3] It should be recognized at the outset that zoning for historic preservation is in many respects out of step with traditional zoning philosophy. *See* 1 A. Rathkopf, The Law of Zoning and Planning § 15.01 (4th ed. 1975) (emphasizing differences in purposes and objectives between the two modes of zoning).

[4] *See* Comment, *Legal Methods of Historic Preservation, supra* note 1, at 620 (zoning is the preferred method of preservation since large areas can be regulated without compensation).

[5] The principal federal enactments in the area of historic preservation are: Antiquities Act, 16 U.S.C. §§ 431-33 (1976) (authorizing presidential designation of historically significant monuments); Historic Sites Act of 1935, 16 U.S.C. § 461 (1976) (establishing the National Register of Historic Places); Historic Preservation Act of 1966, 16 U.S.C. § 470 (1976) (expanding federal funding, broadening scope of National Register, encouraging joint state-federal operations, and establishing the Advisory Council on Historic Preservation). For an overview of the federal legislation, see Fowler, *supra* note 1; Gray, *supra* note 1; Comment, *Historic Preservation: Detroit's Ordinance Almost Puts It All Together*, 55 U. Det. J. Urb. L. 807, 811-14 (1978).

[6] *See* R. Nelson, Zoning and Property Rights 7-8 (1977).

[7] *See* Dukeminier, *Zoning for Aesthetic Objectives: A Reappraisal*, 20 L. & Contemp. Prob. 218, 224 (1955), wherein the author summarizes traditional preferences of land use control as follows: "Among the strongest preferences of our society is for land use to be determined largely by private volition, and legal doctrine which implements this preference is a social hypothesis that goal values can more readily be achieved with a minimum of community intervention." *Id.*

That zoning marks a basic change in property-right institutions is supported by Nel-

Since the Supreme Court's decision in *Village of Euclid v. Ambler Realty Co.*[8] in 1926, it has been well settled that zoning is a valid exercise of the police power, the inherent and plenary power vested in a state for the protection of public safety, health, morals, and general welfare.[9] Unlike the power of eminent domain, exercise of the police power does not require just compensation,[10] nor does the enactment of zoning districts ordinarily constitute a "taking."[11]

At this point it should be noted that the powers of eminent domain and the police power are not always easily distinguished. There is commentary supporting the proposition that a strict conceptual dichotomizing of the two is misleading.[12] This is particularly relevant in view of the fact that an excessive exercise of the police power may involve questions of taking and just compensation.[13] The confusion in this area has been contributed to in no small degree by the Supreme Court's employment of a po-

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son, who argues that zoning creates a collective, coercive right in the community to prevent forbidden uses. R. NELSON, *supra* note 6, at 16-18, 45-51. *But see* Borough of Cresskill v. Borough of Dumont, 28 N.J. Super. 26, 100 A.2d 182, 190 (1953) (real object of zoning ordinances is to protect the private use of property by prohibiting private and public nuisances).

[8] 272 U.S. 365 (1926).

[9] *Id.* at 387. *See* City of Jackson v. Bridges, 243 Miss. 646, 654, 139 So. 2d 660, 663 (1962) (upholding constitutionality of zoning ordinance as valid exercise of police power). For definitions of the police power, see Stone v. Mississippi, 101 U.S. 814, 818 (1879); Munn v. Illinois, 94 U.S. 113, 145 (1876); Drysdale v. Prudden, 195 N.C. 722, 143 S.E. 530, 536 (1928).

[10] *See* Northern Pac. Ry. v. Minnesota *ex rel.* City of Duluth, 208 U.S. 583, 597 (1907) (obedience to police power without compensation is not violative of constitutionally protected property rights); Mugler v. Kansas, 123 U.S. 623, 669 (1887) (states' power to prohibit property use prejudicial to the health, morals or safety of the public cannot be burdened with the requirement of compensation).

[11] *See, e.g.*, City of Little Rock v. Sun Bldg. & Dev. Co., 199 Ark. 333, 336, 134 S.W.2d 582, 585 (1939) (zoning ordinances ordinarily accomplish no taking and require no compensation as the property owner is sufficiently compensated by sharing in the general results).

[12] *See* W. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN 30-32 (1977) (erroneous to believe that the two powers are mutually exclusive, since eminent domain is usually conjoined with other powers).

[13] *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (if private property regulation goes too far, it will be recognized as a taking). *See also* Sax, *Takings and The Police Power*, 74 YALE L.J. 36, 63 (1964) (where losses result from enterprise activity of government, compensation should be required). *See* notes 28 and 31 and accompanying text *infra*.

lice power rationale in upholding an eminent domain exercise.[14]

Several basic principles of zoning law provide an analytical framework for historic preservation. First, states generally refrain from exercising the zoning power,[15] preferring instead to delegate this power to counties and municipalities through enabling legislation.[16] Enabling acts typically recite the police power purposes of promoting health, safety, and the general welfare,[17] but may also include specific purposes, such as historic preservation.[18] More commonly, however, the power to zone for historic objectives is granted by separate enabling legislation.[19] Since local zoning ordinances are legislative in nature, they bear the nor-

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[14] Berman v. Parker, 348 U.S. 26, 31-32 (1954). *See* note 34 and accompanying text *infra.*

[15] It is essential that the police power rests in the state—not in its subdivisions. Without delegation, the exercise of police power by counties, municipalities, or other subunits is invalid. *See* Connor v. City of Birmingham, 36 Ala. App. 494, 60 So. 2d 474, 475 (1952) (municipal corporation is a creature of the state and exercises police power under authority granted by the state); Barton v. Hardin, 204 Ga. 108, 48 S.E.2d 882, 883 (1948) (county has only delegated powers conferred by the state); City of Jackson v. Freeman-Howie, Inc., 239 Miss. 84, 93-94, 121 So. 2d 120, 123-24 (1960) (municipalities only have such powers as granted by their charter and state statutes; zoning ordinances must conform to enabling statutes); 1 A. RATHKOPF, *supra* note 3, §§ 2.01-.02 (discussing the nature of police power and the necessity of delegation).

[16] Delegation can be to statewide agencies but more commonly the delegation is to local government. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 33 (1971). General grants of police power are generally insufficient to support zoning; the courts prefer that such power be specifically conferred. *See* Ellison v. City of Ft. Lauderdale, 183 So. 2d 193, 195 (Fla. 1966) (city which failed to meet requisites of specific grant of zoning power could not rely upon general grant of police power); Lunter v. Laudeman, 251 Md. 203, 246 A.2d 540, 544 (1968) (power to zone derived from specific enabling acts and not from general grant of police power); 1 R. ANDERSON, *supra* note 1, § 2.20 (general discussion of specificity in delegation). *See generally* Comment, *Zoning Morality—An Abuse of the Legislative Grant?*, 4 TULSA L.J. 76 (1967). *But cf.* Comment, *Historic Preservation Cases: A Collection, supra* note 1, at 237 (nonspecific police power statutes granting power to regulate the construction or alteration of buildings can delegate the power to establish historic district zoning).

[17] *E.g.*, MISS. CODE ANN. § 17-1-3 (1972).

[18] *E.g.*, TEX. REV. CIV. STAT. ANN. art. 1011a (Vernon 1963) (general enabling legislation combining the basic police power purposes with the specific purpose of preserving places of historic significance). *See also* 2 R. ANDERSON, *supra* note 1, § 9.69, at 263 (commenting that growing acceptance of historic preservation has led to amendment of enabling legislation).

[19] *See* 2 P. ROHAN, *supra* note 1, § 7.02(2) (legislation typically authorizes establishment by municipalities and counties of historic districts and the commissions to supervise them).

mal presumptions of constitutionality afforded legislation[20] and saddle contesting parties with difficult burdens of proof.[21] On the other hand, since zoning is in derogation of the common law,[22] courts are inclined to construe strictly enactments in favor of property owners.

B. Common Zoning Challenges

Challenges to zoning ordinances may follow several courses. Ordinances may not fail to adhere to the hearing and notice requirements of due process,[23] nor may they fail to respect specific procedural mandates of state enabling statutes.[24] In substance,

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[20] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) (zoning is legislative judgment which if "fairly debatable" will be allowed to control); Robinson Indus. v. City of Pearl, 335 So. 2d 892, 895 (Miss. 1976) (zoning is essentially a legislative function subject to limited judicial review); Howie v. Autrey, 209 So. 2d 904, 905 (Miss. 1968) (zoning is presumed valid and will not be disturbed if fairly debatable).

[21] *See, e.g.*, City of Jackson v. Cunningham, 253 So. 2d 385, 386 (Miss. 1971) (evidence must show enactment to be clearly unreasonable, capricious, and arbitrary); Moore v. Carrollton, 517 S.W.2d 367, 370 (Tex. Civ. App. 1974) (similar holding); Piper v. Meredith, 110 N.H. 291, 266 A.2d 103, 108 (1970) (burden on plaintiff to show absence of "fair reason" for ordinance).

[22] *See, e.g.*, Monument Garage Corp. v. Levy, 266 N.Y. 339, 194 N.E. 848, 850 (1935) (no extension of provisions by implication since zoning in derogation of common law); State v. City of Nashville, 207 Tenn. 672, 343 S.W.2d 847, 850 (1961) (strict construction since ordinances are in derogation of common law and landowners are deprived of otherwise lawful use of their property). *See also* 3 R. ANDERSON, *supra* note 1, §§ 16.02-.07 for examination of strict construction maxim. Anderson does not exaggerate, however, the effect of the strict construction maxim. He observes (1) that such rules are often used merely to explain results and (2) that the countervailing maxim of liberal construction of remedial statutes presents the courts with a choice. *Id.* at § 16.06. For examples of liberal construction, see Papaionau v. Commissioners of Rehoboth, 25 Del. Ch. 327, 20 A.2d 447, 449 (1941) (enabling legislation to be liberally construed); McCurley v. City of El Reno, 138 Okla. 92, 280 P. 467, 470 (1929) (temporary zoning to be liberally construed).

[23] *See, e.g.*, Masters v. Pruce, 290 Ala. 56, 274 So. 2d 33, 39-41 (1973) (statute authorizing counties to zone in unincorporated areas was unconstitutional since it did not include provisions for notice and hearing); Bell v. Studdard, 220 Ga. 756, 141 S.E.2d 536, 539 (1965) (ordinance not providing for hearing and notice clearly contravened due process). *See also* Ridgewood Land Co. v. Simmons, 243 Miss. 236, 251, 137 So. 2d 532, 538 (1962) (appearance at hearing is waiver of objections to notice).

[24] *See, e.g.*, Pyramid Corp. v. DeSoto County Bd. of Supervisors, 366 F. Supp. 1299, 1302 (N.D. Miss. 1973) (period between publication and hearing not in conformity with state statute; ordinance invalid); Brooks v. City of Jackson, 211 Miss. 246, 253-54, 51 So. 2d 274, 276-77 (1951) (notice failing to provide name of municipality and place of hearing as required by statute rendered ordinance void). For a discussion of the basics of hearing and notice in the zoning context, see 1 A. RATHKOPF, *supra* note 3, §§ 10.03-.12.

ordinances must not be "unreasonable;" they may not be confiscatory, arbitrary, or directed toward objects beyond the legitimate exercise of the police power.[25] It is also axiomatic that ordinances valid upon their face may be found invalid when applied to a particular factual situation.[26]

As previously stated, zoning does not normally amount to a taking.[27] Generally, land-use controls are allowed considerable deference because their impact is broad and persons restricted are thought to share in the benefit to the community.[28] Also, it is clear that a zoning or refusal to rezone is not to be found invalid upon the sole ground that the complaining party suffered a diminution in property value or other economic loss.[29] Zoning is not

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[25] "Unreasonableness" has emerged as a standard appellation for constitutional infirmity. *See, e.g.,* Saar v. Town of Davie, 308 F. Supp. 207, 208 (S.D. Fla. 1969) (court's role is to decide if ordinances are clearly arbitrary and unreasonable, i.e., having no substantial relation to health, safety or general welfare); City of Phoenix v. Collins, 22 Ariz. App. 145, 524 P.2d 1318, 1321 (1974) (in final analysis court must determine if zoning as applied to subject property is reasonable and of public benefit); Kropf v. City of Sterling Heights, 391 Mich. 139, 215 N.W.2d 179, 186-87 (1974) (in zoning, the state interest need not be compelling; reasonableness is sufficient); City of Jackson v. Bridges, 243 Miss. 646, 654, 139 So. 2d 660, 663 (1962) (rezoning is invalid if unreasonable); J.D. Constr. Corp. v. Board of Adjustment, 119 N.J. Super. 140, 290 A.2d 452, 455 (1972) ("substantive due process demands that zoning powers, like all police power, must be reasonably exercised. A zoning regulation must not be unreasonable, arbitrary or capricious."). *See generally* 1 A. RATHKOPF, *supra* note 3, §§ 4.02-.05.

[26] *See, e.g.,* Stalzer v. Village of Matteson, 14 Ill. App. 3d 891, 303 N.E.2d 489, 496 (1973) (zoning cases are sui generis; each ordinance must be tested upon its own circumstances and facts); Jones v. City of Hattiesburg, 207 Miss. 491, 496, 42 So. 2d 717, 718 (1949) (where reasonableness of interpretation and application is at issue, each case must be determined on the facts shown).

[27] *See* note 11 and accompanying text *supra.*

[28] The theory is that of reciprocity of benefits. "He who is limited in the use of his property finds compensation therefor in the benefits accruing to him from the like limitations imposed upon his neighbor." State *ex rel.* Carter v. Harper, 182 Wis. 148, 196 N.W. 451, 453 (1923). The classic cases in this area of the law are: Goldblatt v. Hempstead, 369 U.S. 590, 590-98 (1962) (requiring the cessation of mining operation adjacent to a city); Miller v. Schoene, 276 U.S. 272, 277 (1928) (requiring the removal of red cedar trees endangering apple harvest); Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 379-97 (1926) (upholding zoning limits on industrial development); Hadacheck v. Sebastian, 239 U.S. 394, 404-13 (1915) (requiring the removal of a brickyard on the ground that such use was inconsistent with neighboring uses).

[29] *See* Leary v. Adams, 226 Ala. 472, 147 So. 391, 395 (1933) (financial loss from exclusion of service station from residential area not grounds for invalidating restriction); City of Little Rock v. Sun Bldg. & Dev. Co., 199 Ark. 333, 336, 134 S.W.2d 582, 585 (1939) (taking does not result from a zoning-caused reduction in land value); Sunray DX

designed to effect the most profitable use of every tract, but rather to create a scheme of land use which promotes the overall welfare.[30] Nonetheless, an ordinance which deprives an owner of the total value[31] or all reasonable use[32] of his property would be confiscatory; and, though zoning confiscations are exceptional,[33] it is in this context that distinctions between the police power and eminent domain become blurred. It remains a crucial point, however, that in zoning cases questions of confiscation are separate from questions of mandatory compensation. The tendency of the courts is to rule confiscatory enactments to be void exercises of police power rather than exercises of eminent domain.[34]

Equal protection challenges are endemic to zoning. The dictates of enabling legislation,[35] as well as precepts of equal protection, require that zoning be in accordance with a comprehen-

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Oil Co. v. City of Jackson, 209 So. 2d 838, 840 (Miss. 1968) (loss in market value from refusal to rezone did not justify reversal); Palazzola v. City of Gulfport, 211 Miss. 737, 745, 52 So. 2d 611, 613 (1951) (citing Hadacheck v. Sebastian, 239 U.S. 394 (1915)) (serious pecuniary injustice can be inflicted without being arbitrary).

[30] *See* Humthlett v. Reeves, 212 Ga. 8, 90 S.E.2d 14, 19 (1955) (showing of more profitable use than that allowed is insufficient to establish unreasonableness); City of Hagerstown v. Hutson, 229 Md. 475, 184 A.2d 811, 813 (1962) (zoning denying most profitable use is not confiscation); Ridgewood Land Co. v. Simmons, 243 Miss. 236, 247, 137 So. 2d 532, 537 (1962) (common good and general welfare are primary considerations in making zoning restrictions).

[31] Here the classic case is Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), where the Court ruled that statutory limits on mining to prevent subsidence in habitated areas did amount to confiscation since the mineral estate was for all practical purposes abolished. *Id.* at 414. But in light of the Court's later rulings in United States v. Central Eureka Mining Co., 357 U.S. 155, 165-69 (1958) (upholding regulation resulting in a diminution of property value from $800,000 to $60,000) and Goldblatt v. Hempstead, 369 U.S. 590, 590-98 (1962) (record did not establish any loss of value from restrictions; other uses possible), the test for takings apparently has been whether or not there was total diminution in value by virtue of the government restrictions.

[32] *See* City of Miami v. Zorovich, 195 So. 2d 31, 36 (Fla. Dist. Ct. App. 1967) (confiscation requires showing of complete destruction of beneficial use and not just deprivation of any one use).

[33] *See, e.g.*, Horn Constr. Co. v. Town of Hempstead, 41 Misc. 2d 438, 245 N.Y.S.2d 614, 620-22 (Sup. Ct. 1963) (confiscation found where testimony overwhelmingly established impracticality of using property as zoned).

[34] Benscher, *Some Tentative Notes on the Integration of Police Power and Eminent Domain By the Courts: So-Called Inverse or Reverse Condemnation*, 1 URB. L. ANN. 1, 4, 6 (1968).

[35] *See, e.g.*, MISS. CODE ANN. § 17-1-9 (1972) (specifying that zoning be in accordance with a comprehensive plan).

sive plan ensuring a systematic approach and forethought.[36] Although invidiously discriminatory ordinances are invalid,[37] it is the very nature of zoning that similar properties in separate districts may be subjected to varying degrees of restriction.[38] There is no such theoretical shelter, at least under the older view, against discrimination within the same district.[39] Modern zoning techniques are apparently lessening the emphasis on intra-district uniformity, but these applications remain the exception.[40] Also, ordinances commonly permit the continuance of pre-existing uses not in conformity with restrictions,[41] although long-term perpetuation of such uses is discouraged through prohibitions of expansion or replacement.[42]

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[36] *See* Berry v. Embrey, 238 Miss. 819, 824, 120 So. 2d 165, 168 (1960) (municipal authorities have wide discretion in zoning but there must be a comprehensive plan). *See generally* Haar, *In Accordance with a Comprehensive Plan,* 68 HARV. L. REV. 1154 (1955); 1 A. RATHKOPF, *supra* note 3, §§ 12.01-.06.

[37] *See* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 132 (1978) ("antithesis" of land use control is discriminatory zoning). The obvious example of invidious discrimination is zoning on the basis of race. *See* Anderson v. Town of Forest Park, 239 F. Supp. 576, 582, 584-85 (W.D. Okla. 1965) (selective use of strict building code created discriminatory buffer zone against black housing); Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E. 2d 867, 870 (1940) (racial restrictions on property use are beyond the reach of the police power).

[38] *See, e.g.,* Herbert v. Board of Supervisors, 241 Miss. 223, 130 So. 2d 250 (1961), wherein the court stated:

> Zoning regulations may incidentally confer a benefit upon some and place a burden upon others, but such result is not the true criterion by which the validity of such order is to be tested. That criterion, in a case of this kind, is the public health, morals and safety of the community at large, in which the regulation in question is made operative.

Id. at 252, 130 So. 2d at 253.

[39] For examples of decisions stressing the need for uniformity, see Marathon Builders, Inc. v. Polinger, 263 Md. 410, 283 A.2d 617, 624 (1971) (smaller tract, once part of larger tract, controlled by computation of density for apartment buildings on larger tract); Henry v. White, 194 Tenn. 192, 250 S.W.2d 70, 72-73 (1952) (invalid to ban public garages in one portion of a district and not in another).

[40] *See* Prince George County v. M & B Constr. Corp., 267 Md. 338, 297 A.2d 683, 695 (1972) (cluster zoning not invalid for lack of uniformity). *See generally* 1 R. ANDERSON, *supra* note 1, § 5.22.

[41] Hagman recognizes four categories of nonconforming uses: "1. nonconforming buildings, 2. conforming uses of nonconforming buildings, 3. nonconforming uses of conforming buildings, and 4. nonconforming uses of land." D. HAGMAN, *supra* note 16, § 80, at 147.

[42] *See, e.g.,* Moffatt v. City of Forrest, 234 Ark. 12, 350 S.W.2d 327, 329 (1961) (reconstruction of nonconforming property barred where destruction exceeded 60%); Ezell

The comprehensive plan may be modified by amendments, variances, and special exceptions[43] with such measures often being attacked as "spot zoning." The term "spot zoning" is loosely synonomous with discrimination but is more accurately applied to describe an enactment benefiting a single plot within a district.[44] "Reverse spot zoning" is sometimes alleged where the

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v. City of Pascagoula, 240 So. 2d 700, 704 (Miss. 1970) (nonconforming nightclub not to be rebuilt where hurricane left only foundation); Palazzola v. City of Gulfport, 211 Miss. 737, 746, 52 So. 2d 611, 613 (1951) (ordinance proscribing restoration if destruction exceeded 50% was not unreasonable).

Where the ordinance contains no specific provision prohibiting restoration, the tendency is to allow reconstruction. *See* Krul v. Board of Adjustment, 126 N.J. Super. 150, 313 A.2d 220, 221 (1973) (per curiam) (nonconforming building destroyed by fire; reconstruction upon old foundation permitted); 1 R. ANDERSON, *supra* note 1, § 6.58 (examples of judicial and legislative solutions).

[43] An amendment is a permanent legislative alteration of either the district lines or textual content of the ordinance. Procedural requirements are not less stringent than in original zoning. *See* Blacklidge v. City of Gulfport, 223 So. 2d 530, 533, 535 (Miss. 1969) (city had authority to amend comprehensive zoning ordinance if change to general welfare of the municipality as a whole was examined); City of Jackson v. Bridges, 243 Miss. 646, 655, 139 So. 2d 660, 663 (1962) (court will not disturb rezoning decision if finding of changed conditions in neighborhood or of mistake in original ordinance was fairly debatable).

A variance is a form of individualized relief which may be available when uniform restrictions are unintentionally harsh or unconstitutional as applied to a particular tract. The aggrieved owner must show special conditions of personal hardship and that the general public will not be affected adversely by the requested variance. The variance is thus a necessary safety valve, but abuse has been widespread. D. HAGMAN, *supra* note 16, § 106, at 106-07. *See generally* Shapiro, *The Zoning Variance Power—Constructive in Theory, Destructive in Practice*, 29 MD. L. REV. 3 (1969).

The special exception is in theory a legislatively preconditioned modification of the otherwise prevailing uniformity of restriction under an ordinance. The ordinance sets out certain circumstances under which an administrative body may grant different treatment for a given parcel of land. *See* 3 R. ANDERSON, *supra* note 1, §§ 9.19, 19.01-.32 (discussing the administration of exceptions and special permits). Distinctions between exceptions and variances are not always clear. *See, e.g.*, Kynerd v. City of Meridian, 366 So. 2d 1088, 1088 (Miss. 1979) (hardship exception); Westminster Presbyterian Church v. City of Jackson, 253 Miss. 495, 506, 176 So. 2d 267, 272 (1965) (variance or exception should not be granted unless proposed use is within the spirit of zoning regulations); Stone v. Cray, 89 N.H. 483, 200 A. 517, 521 (1938) (sharp distinctions between exceptions and variances cannot always be made).

[44] *See* 1 A. RATHKOPF, *supra* note 3, § 26.02. The cases are nearly uniform in their condemnation of spot zoning when the landowner seeks the amendment for his own benefit and where the amendment is not in accordance with the comprehensive plan. *See, e.g.*, McKibben v. City of Jackson, 193 So. 2d 741, 744 (Miss. 1967) (rule stated but circumstances did not amount to spot zoning).

measure enacted adversely affects a rezoned tract.[45]

The final zoning fundamental to be given emphasis here is that regulations, however procedurally exact and uniform in application, must pass the ultimate test of reasonable relation to legitimate public objectives of the police power.[46] Health and safety measures such as restrictions affecting traffic flow,[47] population density,[48] building height,[49] and fire control[50] have posed little difficulty in this area. On the other hand, the general welfare has proved an elusive concept, but one capable of expansion in accordance with societal demands.[51]

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[45] *See* Marshall v. Salt Lake City, 105 Utah 111, 141 P.2d 704, 711 (1943) (restrictions applying only to property at intersections not spot zoning since definite and comprehensive plan existed); Zopfi v. City of Wilmington, 273 N.C. 430, 160 S.E.2d 325, 332 (1968) (a spot zoning can arise where small area is placed arbitrarily under restrictions more burdensome than those applicable to surrounding property).

[46] *See* note 25 *supra.*

[47] *See, e.g.,* Larkin Co. v. Schwab, 242 N.Y. 330, 151 N.E. 637, 640, 212 N.Y.S. 853, 853 (1926) (upholding refusal of service station permit for traffic considerations); Food Corp. v. Zoning Bd. of Adjustment, 384 Pa. 288, 121 A.2d 94, 96 (1956) (lessening of traffic congestion proper consideration though facts did not warrant permit denial). *See generally* Fonoroff & Terrill, *Controlling Traffic Through Zoning,* 21 SYRACUSE L. REV. 857 (1970).

[48] *See, e.g.,* Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (upholding restriction of land use to one-family dwellings); City of Jackson v. Ridgeway, 258 So. 2d 439, 443 (Miss. 1972) (finding the exclusion of duplexes from single family area not unreasonable). *But see* Moore v. City of East Cleveland, 431 U.S. 494, 504-06 (1977) (overturning ordinance arbitrarily excluding from occupancy of dwelling non-nuclear members of the family).

[49] *See, e.g.,* Welch v. Swasey, 214 U.S. 91, 107 (1909) (upholding 80 to 100 foot limitation); C.F. Robinson Indus. v. City of Pearl, 335 So. 2d 892, 895 (Miss. 1976) (approving restriction of sign height).

[50] *See, e.g.,* Ballard v. Smith, 234 Miss. 531, 548, 107 So. 2d 580, 587 (1959) (inflammable commodities are a proper consideration in zoning for service stations).

[51] *See* Village of Euclid v. Ambler Realty Co. 272 U.S. 379, 387 (1926) ("while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation."); Elizabeth City v. Aydlett, 201 N.C. 602, 161 S.E. 78, 79 (1931) ("The police power is not static. It expands to meet conditions which necessarily change as business progresses and civilization advances."); Feiler, *Zoning: A Guide to Judicial Review,* 47 J. URB. L. 319, 319 (1969) ("perhaps no constitutional term is as susceptible of contraction and expansion to meet new situations as is the 'police power' ").

II. Zoning: A Means to An End?

A. *Aesthetic Improvement*

The common purpose of most zoning enactments—the preservation of sensible use patterns and property values—is easily related to the general welfare;[52] however, that relationship is much more open to dispute when the restrictions deal with the particularities of appearance. General appearance regulations include lot size minimums, building size minimums, and setback requirements. While judicial approval was forthright in some early cases,[53] the common reaction was to question the validity of aesthetics as a legitimate objective for the exercise of the police power.[54]

Until comparatively recent times, the prevailing view was that zoning with a solely aesthetic objective was not a valid exercise of the police power.[55] Illustrative of this view is the Mississippi Supreme Court's ruling in *City of Jackson v. Bridges*.[56] In

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[52] *See, e.g.*, Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35, 43 (1972) (concept of zoning implies restriction of individual rights to promote most appropriate use of land throughout municipality).

[53] State *ex rel.* Civello v. City of New Orleans, 154 La. 271, 97 So. 440, 444 (1923) (neighborhood eyesore might be as much a public nusiance as a disagreeable noise or odor); Simon v. Needham, 311 Mass. 560, 42 N.E.2d 516, 518 (1942) (one acre lot size minimum acceptable); Thompson v. City of Carrollton, 211 S.W.2d 970, 971 (Tex. Ct. App. 1948) (minimum house size acceptable means of preserving neighborhood character and values).

[54] *See, e.g.*, Senefsky v. Lawler, 307 Mich. 728, 12 N.W.2d 387, 390 (1943) (ordinance setting minimum size of dwelling held unreasonable exercise of police power; aesthetics may be secondary but not primary factor in restrictions); City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842, 843, 845 (1925) (aesthetic considerations in exclusion of apartment houses held impermissible).

[55] *See* Stoner McCray System v. City of Des Moines, 247 Iowa 1313, 78 N.W.2d 843, 848 (1956) (anti-billboard ordinance unconstitutional; aesthetic considerations can only be auxiliary to other factors of reasonable relation to health, safety and general welfare); Pressnell v. Leslie, 3 N.Y.2d 384, 144 N.E.2d 381, 384, 165 N.Y.S. 2d 488, 492 (1957) (denial of permit for 44 foot radio tower could not be for purely aesthetic reasons, though such considerations were not wholly without weight).

Aesthetic zoning has been one of the most frequent topics for commentary in zoning law. *See generally* Turnbull, *Aesthetic Zoning*, 7 Wake Forest L. Rev. 230 (1971); Comment, *Aesthetic Considerations in Land Use Planning*, 35 Alb. L. Rev. 126 (1970); Comment, *The Aesthetic Factor in Zoning*, 11 Duq. L. Rev. 204 (1972); Comment, *Aesthetic Zoning*, 11 Urb. L. Ann. 295 (1976); Comment, *Zoning for Aesthetics Substantially Reducing Property Values*, 27 Wash. & Lee L. Rev. 303 (1970).

[56] 243 Miss. 646, 139 So. 2d 660 (1962).

that case residential landowners sought a rezoning of certain property from commercial to residential. Although the city had agreed to the amendment, the court held it to be unreasonable as based on aesthetic caprice. This holding was based on the idea that aesthetic objectives alone were insufficient to justify a zoning.[57] At the heart of this and other similar decisions was the notion that aesthetic controls would always be capricious since no single standard could serve all tastes.[58]

The national effect of this restrictive view was mitigated by the favorable attitude of some courts toward the objectives of a given ordinance. "Where an ordinance in issue seemed sensible and worthy of support, the courts coined a rationale foreign to the real purpose of the restriction, discovering some relationship between the ordinance and public health, safety, or morals."[59] Rationales were often tenuous, but, as will be shown, the connection between aesthetics, tourist trade, and the economic welfare of the community eventually found solid acceptance.[60] By the 1970's the trend came full circle with several states holding that zoning for a purely aesthetic purpose was permissible.[61] This trend was in spiritual harmony with the Supreme Court's opinion in *Berman v. Parker*[62] and perhaps in anticipation of

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[57] *Id.* at 656, 139 So. 2d at 664-65. Specifically, the court stated: "It should be kept in mind that aesthetic considerations alone do not justify zoning regulations; and where such regulations are designed merely to preserve the appearance of a designated neighborhood, they are invalid." *Id.*

[58] *See* City of Youngstown v. Kahn Bros. Bldg. Co., 112 Ohio St. 654, 148 N.E. 842, 844 (1925) (stating that legislatures could never agree on the mode of taste to be cultivated); Comment, *Zoning for Aesthetics—A Problem of Definition,* 32 U. CIN. L. REV. 367, 367-68 (1963) (definitional problems arise from the subjective quality of beauty).

[59] 1 R. ANDERSON, *supra* note 1, § 7.13, at 558.

[60] *See, e.g.,* City of Miami Beach v. Ocean & Inland Co., 147 Fla. 480, 3 So. 2d 364, 367 (1941) (public welfare served where aesthetic regulations ensured attractiveness to tourists).

[61] Stone v. City of Maitland, 446 F.2d 83, 89 (5th Cir. 1971); City of St. Paul v. Chicago, St. P. M. & O. Ry., 413 F.2d 762, 767-68 (8th Cir. 1969); Sunad, Inc. v. City of Sarasota, 122 So. 2d 611, 614 (Fla. 1960); State *ex rel.* Civello v. City of New Orleans, 154 La. 271, 97 So. 440, 444-45 (1923); Naegele Outdoor Advertising Co. v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206, 212 (1968); United Advertising Corp. v. Metuchen, 42 N.J. 1, 198 A.2d 447, 449 (1964); People v. Stover, 12 N.Y.2d 462, 467, 191 N.E.2d 272, 275, 240 N.Y.S.2d 734, 738 (1963); Oregon City v. Hartke, 240 Or. 35, 400 P.2d 255, 262-63 (1965).

[62] 348 U.S. 26 (1954).

the Court's rulings in *Village of Belle Terre v. Boraas*[63] and *Penn Central Transportation Co. v. City of New York.*[64]

The *Berman* case concerned urban renewal in Washington, D.C.; its holding left no doubt that the power of eminent domain could be used for aesthetic purposes.[65] Zoning implications arose from Justice Douglas' reliance upon police power formulations and from his "spiritual" notions of public welfare.[66] In contrast, *Belle Terre* dealt specifically with zoning.[67] An ordinance effectively excluding student residents through restriction of land use to one-family dwellings was held not to violate equal protection or the right to travel. Ever the conservationist, Justice Douglas, writing for the majority, offered a simple but broad vision of the police power: "A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs."[68]

Notwithstanding the more liberal attitudes toward aesthetic objectives in zoning, direct controls over specifics of architectural style have largely remained the province of restrictive covenants.[69] Only in two contexts has zoning been of real effect as to fine points of design: the preservation of historic landmarks and districts and the prevention of "look alike" or "look different" subdivisions.[70] The latter situation usually arises where

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[63] 416 U.S. 1 (1974).

[64] 438 U.S. 104 (1978). *See* text beginning at note 118 *infra.*

[65] 348 U.S. at 28, 35-36. In fact it was of no relief to the contesting landowners that their particular building was not offensive. Authority existed to remove all buildings in order to achieve an area-wide solution to urban blight. *Id.* at 34.

[66] *Id.* at 33. Justice Douglas opined:

> The concept of the public welfare is broad and inclusive . . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.

Id.

[67] It is interesting to note that *Belle Terre* was the first zoning case to be decided by the Supreme Court since Nectow v. City of Cambridge, 277 U.S. 183 (1928).

[68] 416 U.S. at 9.

[69] For background as to the utilization of restrictive covenants and equitable servitudes in preservation, see Beckwith, *supra* note 1, at 135-45; Note, *Land Use Controls in Historic Areas, supra* note 1, at 381 (commenting that the use of covenants has been all too rare).

[70] 3 N. WILLIAMS, *supra* note 1, § 71.01, at 256.

property owners of a given area which is not necessarily historic seek to foster or preserve a particular atmosphere by prohibiting disharmonious construction or remodeling.[71] Less frequent in use than "look alike" controls, "look different" controls are the means by which some communities have prohibited large tracts of mass-produced, identical housing. Regulations of either kind are of uncertain validity.[72]

B. Historic Preservation

Initial application of historic zoning occurred in cities possessing districts of obvious architectural charm and historic significance: Charleston, New Orleans, Nantucket, Boston, and Santa Fe. New Orleans' Vieux Carré ordinance is based upon a 1936 amendment to the Louisiana Constitution, the express purpose of which is the preservation of architecturally and historically valuable buildings in the Vieux Carré section.[73] The amendment provides for a commission to review plans relating to alterations of color, texture, or design of building exteriors fronting public streets.[74]

In one of the early challenges to the Vieux Carré restrictions,[75] *City of New Orleans v. Pergament*,[76] the Louisiana Su-

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[71] *Id.*, § 71.03. The author states that existing neighborhoods, sought to be protected, may even lack an established architectural style. *Id.*

[72] *Id.*

[73] LA. CONST. of 1921, art. 14, § 22A (1936).

[74] *Id.* The commission was to act "for the public welfare in order that the quaint and distinctive character of the Vieux Carré section of the City of New Orleans may not be injuriously affected, and in order that the value to the community of those buildings having architectural and historical worth may not be impaired . . . ." *Id.*

In the 1974 Louisiana Constitution the Vieux Carré provision was deleted in favor of a general provision authorizing local governments to adopt historic preservation regulations. LA. CONST. art. 6, § 17.

[75] The first dispute to reach the state's high court was City of New Orleans v. Impastato, 198 La. 206, 3 So. 2d 559 (1941). A property owner was fined for enlarging a lavatory on the rear exterior of his building, a structure of considerable historic significance. The defendant complained that since the construction did not abut a public street, the commission had exceeded the authority granted under the 1936 constitutional amendment. The court ruled that under the amendment and resulting city ordinance the word exterior meant all of the outer surfaces of a building—not just those portions of the building facing a street. 3 So. 2d at 561.

[76] 198 La. 852, 5 So. 2d 129 (1941). The dispute arose when a service station owner erected a larger advertising sign on his property without the approval of the Vieux Carré

preme Court avoided the issue of the propriety of zoning for purely aesthetic purposes by pointing to commercial as well as sentimental public benefits. For example, increased tourism from the aesthetic improvement would contribute to the general welfare.[77] Of greater import, however, was the court's concern for the area as a whole—the *tout ensemble*—and not just for the individual structures of historic value. Under this view, the court extended the Vieux Carré appearance controls to other non-historic property.[78] The *tout ensemble* approach has been viewed as representing "a realistic recognition that the quality of the area derives not only from individual worthy buildings, but from the scale of the buildings, their harmony with each other, and the combination of buildings and open spaces."[79]

Several other disputes respecting the Vieux Carré ordinance are significant to the overall standing of historic preservation. The two cases of *City of New Orleans v. Levy*[80] involved the installation of a plexiglass roof over a restaurant courtyard and the litigation produced three separate opinions. The first opinion followed *Pergament* in upholding the restrictions on a commercial aesthetic rationale;[81] the second denied the city's request

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Commission. 5 So. 2d at 129-30.

[77] *Id.* at 131.

[78] *Id.* The court stated that modern as well as ancient buildings fell under regulation because:

> The purpose of the ordinance is not only to preserve the old buildings themselves, but to preserve the antiquity of the whole French and Spanish quarter, the *tout ensemble,* so to speak, by defending this relic against iconoclasm or vandalism. Preventing or prohibiting eyesores in such a locality is within the police power and within the scope of this municipal ordinance. The preservation of the Vieux Carre as it was originally is a benefit to the inhabitants of New Orleans generally, not only for the sentimental value of this show place but for its commercial value as well, because it attracts tourists and conventions to the city, and is in fact a justification for the slogan, America's most interesting city.

Id.

[79] 3 N. WILLIAMS, *supra* note 1, § 71.10, at 269.

[80] 233 La. 844, 98 So. 2d 210 (1957) (city's request for injunction against continued use of the non-conforming roof); 223 La. 14, 64 So. 2d 798 (1953) (appeal of conviction for ordinance violation).

[81] 64 So. 2d at 801-02. The defendant also contended that an amendment to the ordinance excepting certain squares from regulation was discriminatory. The court noted, however, that even if the amendment were unconstitutional, this fact would offer no relief to the defendant. An unconstitutional amendment would be a nullity, with the

for an injunction for the removal of the roof because of inconsistent regulations enforcement in the area.[82] Despite the second opinion's indication of an equal protection infringement,[83] the court on rehearing based its denial of the injunction on the "clean hands doctrine," not on constitutional law.[84]

Finally, a federal district court was presented with an inverse condemnation claim arising from the Vieux Carré ordinance in *Maher v. City of New Orleans*.[85] The city council had denied Maher's application for a permit to demolish a victorian cottage on his Vieux Carré property,[86] and his suit maintained that the denial constituted a taking. The trial court ruled that the ordinance would be confiscatory only if it precluded use of the cottage for any purpose for which it was reasonably adapted and found that Maher had not met this burden of proof.[87] Subsidiary challenges to the ordinance as not being reasonably related to the purposes of zoning law and as relying upon an unconstitutional delegation of legislative authority were dismissed,

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original delineation of the Vieux Carré district remaining in effect. *Id.* at 802. For a more detailed analysis of the problems arising from the exception of certain areas from regulation, see Vieux Carré Property Owners & Assocs., Inc. v. City of New Orleans, 246 La. 788, 167 So. 2d 367, 370-74 (1964) (declaratory judgment), wherein the exceptions were found discriminatory and inimical to the Louisiana constitutional amendment providing for the Vieux Carré district.

[82] 98 So. 2d at 212-14. The court reasoned that since there had been innumerable non-conforming alterations without intervention by the city, the present request for an injunction constituted an unfair, unjust and illegal discrimination, and should not be granted until regulatory measures were enforced in like manner as to all persons similarly situated. *Id.*

[83] *Id.*

[84] *Id.* at 218 (there was no proof of deliberate discriminatory design and such is not to be presumed).

[85] 371 F. Supp. 653 (E.D. La. 1974), *aff'd*, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). For preceding state court litigation, see Maher v. City of New Orleans, 222 So. 2d 608 (Ct. of App. 1969), *aff'd*, 256 La. 131, 235 So. 2d 402 (1970).

[86] The city council's denial was actually a reversal of the Vieux Carré Commission, which had approved the demolition application. 371 F. Supp. at 656.

[87] *Id.* at 662 (quoting Summers v. City of Glen Cove, 17 N.Y.2d 307, 217 N.E.2d 663, 270 N.Y.S.2d 611 (1966)). The court dismissed Maher's claim that the ordinance rendered his property practically unusable on the ground that there was no evidence to indicate that serious effort had been made to rent or sell the cottage. *Id. Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590, 595-96 (1962) (rejecting contention that regulation confiscated excavation site since there was no evidence of loss in property value); *see* notes 28 and 31 and accompanying text *supra*.

largely on the basis of *Pergament*.[88] Even though Maher proposed to construct a Spanish style building on the site, it was of no avail to him. The court found that in light of the concern for the architectural and sociological aggregate, the *tout ensemble*, "it could well be a disservice to the 'charm and character' of the Vieux Carre to permit the demolition of existing buildings in order to create new replicas of the past."[89]

On appeal, a panel of the Court of Appeals for the Fifth Circuit concluded that the objectives of the ordinance were legitimate[90] and its procedures consonant with due process. In the court's view, "guidelines to aid a commission charged with implementing a public zoning purpose need not be so rigidly drawn as to prejudge the outcome in each case, precluding reasonable administrative discretion."[91] Though there were no published standards to guide the Vieux Carré Commission and though past enforcement was not "uniformly edictable,"[92] due process was satisfied by firm steps in the constitutional provision and resulting ordinance assuring "that the Commission would not be adrift to act without standards in an impermissible fashion."[93]

The "taking" issue raised before the district court in *Maher* was argued again before the panel. Opposition to the basic controls over demolition and building design was accompanied by the further contention that affirmative duties to repair and preserve imposed by the ordinance exceeded the bounds of police power and accomplished a taking.[94] The court relied upon the United States Supreme Court decisions in *Mugler v. Kansas*[95]

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[88] 371 F. Supp. at 662-64.

[89] *Id.* at 664.

[90] 516 F.2d at 1061. The court stated: "[C]onsidering the nationwide sentiment for preserving the country's heritage and with particular regard to the context of the unique and characteristic French Quarter, the objective of the Vieux Carre Ordinance falls within the permissible scope of the police power." *Id.*

[91] *Id.* at 1062. As social and economic legislation, the ordinance needed only to have processes which were reasonable and not arbitrary to satisfy due process. *Id.* at 1061. *See* note 25 and accompanying text *supra*.

[92] 516 F.2d at 1061 n.57.

[93] *Id.* at 1062.

[94] *Id.* at 1065.

[95] 123 U.S. 623 (1887) (upholding the closing under prohibition laws of a brewery without compensation to the owner).

and *Goldblatt v. Town of Hempstead*[96] and refused acceptance of Maher's contentions. The Fifth Circuit read *Mugler* and *Goldblatt* as establishing that a properly enacted prohibition against property uses adverse to public interest could not be burdened with a requirement of compensation to each owner for losses sustained.[97] The panel reasoned that the Vieux Carré ordinance as applied to the Maher property was not a taking, as it had not been proved that "the ordinance so diminished the property value as to leave Maher, in effect, nothing."[98] Thus the panel applied the requirement, evolved from *Goldblatt,* of proving a total diminution in value to establish a taking quiring just compensation.[99] The opinion also noted that it was not uncommon for one to make expenditures in order to comply with a law. Here, since the purpose of the ordinance was legitimate and the means reasonable, the requirement of expenditure was valid. A cautionary note was added, however, that every application of such an ordinance would not necessarily withstand similar attack.[100]

Preservation efforts in other areas of the country followed the pattern of the early Louisiana decisions. Advisory opinions by the Massachusetts Supreme Court in 1955 approved enabling legislation for historic districts at Nantucket[101] and Beacon Hill.[102] The decision respecting Nantucket took special note of the impact of preservation on tourist revenues;[103] the Beacon Hill decision emphasized the historic significance and architectural homogeneity of the area as the rationale for the controls.[104]

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[96] 369 U.S. 590 (1962) (upholding the closing of a mine by city ordinance without compensation to the owner). *See* notes 28 and 31 and accompanying text *supra.*

[97] 516 F.2d at 1065 (quoting Goldblatt v. Town of Hempstead, 369 U.S. at 593).

[98] 516 F.2d at 1066.

[99] *See* notes 28 and 31 and accompanying text *supra.*

[100] 516 F.2d at 1067. The court in effect reiterated the zoning maxim that ordinances valid on their face can be unconstitutional under some set of facts. *See* note 26 and accompanying text *supra.*

[101] Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557 (1955).

[102] Opinion of the Justices to the Senate, 333 Mass. 783, 128 N.E.2d 563 (1955).

[103] 128 N.E.2d at 562. Specifically the court found the act proposed for Nantucket not to be a taking, even though restrictions might "in occasional instances bear down heavily." *Id.* at 560. The act was not seen as an exercise of zoning but was seen as an exercise of the police power closely resembling zoning. *Id.* at 560-61.

[104] 128 N.E.2d at 566-67. *See* 3 N. WILLIAMS, *supra* note 1, § 71.12, at 276 (com-

In 1964, a Santa Fe historic zoning ordinance similarly survived a challenge that one of its requirements was arbitrary and unreasonable in specifying a maximum window pane size of thirty inches.[105] There was no substantial disagreement among the parties or the court that preserving historic areas was within the general welfare; the argument was that the meticulousness of the window regulation, going to mere aesthetic detail, exceeded the scope of the general welfare. The court's view, however, was that the window design was as much a part of the Santa Fe style as any other architectural detail.[106] Moreover, the lack of preservation-oriented enabling legislation at the time of the ordinance's adoption was not permitted to thwart the zoning plan. The purpose of the Santa Fe ordinance was found to be within the general welfare, thus standard zoning enabling legislation sufficed.[107]

In the same year, the New Hampshire Supreme Court gave its approval to the use of architectural controls to prevent impairment of the "atmosphere" of the Town of Deering.[108] The Deering ordinance prohibited the erection of any structure within one-fourth mile of the town common without approval of the selectmen. While the enactment was not seen as a full-fledged zoning ordinance, it was held a proper exercise for the protection of public institutions for the general welfare.[109] The court was not troubled by the lack of explicit standards in the ordinance, since it was believed that the atmosphere to be preserved was clear from the area itself.[110]

After the decisions in the foregoing discussion, the permissibility of historic district legislation was little questioned. Ques-

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menting that the court used the stronger Nantucket case to justify the more questionable Beacon Hill Act).

[105] City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13, 19 (1964).

[106] 389 P.2d at 17-18.

[107] *Id.* at 17. *See* Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 355 A.2d 550, 557 (D.C. 1976) (zoning could pursue preservation objective without specific authorization for preservation programs under zoning code); 2 P. ROHAN, *supra* note 1, § 7.03[3] (discussing preservation authority under the general zoning power).

[108] Town of Deering v. Tibbetts, 105 N.H. 481, 202 A.2d 232, 234-35 (1964).

[109] 202 A.2d at 235.

[110] *Id.*

tions did remain, however, respecting enactments controlling individual sites or structures not within any preservation district and often without real tourist appeal. Such controls appeared far more susceptible than district ordinances to allegations of confiscation or discriminatory spot zoning.[111] In an attempt to avoid these traditional zoning pitfalls, preservationists could avoid direct identification of landmark laws as zoning,[112] while at the same time patterning the actual techniques used after modern zoning devices such as the floating zone and mini-district.[113] A floating zone may be described as "a zoning category, defined in the text of an ordinance, which has specified criteria for eligibility rather than a fixed geographical location."[114] Properties throughout the jurisdiction meeting the criteria are, accordingly, eligible for rezoning after suitable notice and hearing. The floating zone gives the preservationist authority a means of applying architectural controls on individual structures at scattered locations, without affecting adjoining properties,[115] and is frequently used for the zoning of future cluster develop-

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[111] For a case in which the application of landmark controls was found unconstitutional, see Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 316 N.E.2d 305, 359 N.Y.S.2d 7 (1974). In this instance the affected property was owned by a charitable corporation, which established that without the ability to demolish the existing structure and erect expanded facilities its use of the site would have to cease. The court found application of the law under these facts to be "nothing short of a naked taking." 316 N.E.2d at 310-12.

Rohan suggests that *Lutheran Church* be read as indicating a stiffer test of historic controls may be employed when a charitable use is frustrated. 2 P. ROHAN, *supra* note 1, § 7.04[3]. *See also* Trustees of Sailors' Snug Harbor v. Platt, 29 A.D.2d 376, 288 N.Y.S. 2d 314, 316 (1968) (test for New York landmarks law when applied to charitable institution is whether controls seriously interfere with charitable purpose). See text beginning at note 119 for further analysis of the New York City landmarks preservation scheme.

[112] Whether or not historic regulations are in the nature of zoning has been troublesome only where landmark regulation is involved. *See* Opinion of the Justices to the Senate, 333 Mass. 773, 128 N.E.2d 557, 560-61 (1955) (zoning only closely resembles historic districting); Lutheran Church in America v. City of New York, 35 N.Y.2d 121, 129-31, 316 N.E.2d 305, 310-11, 359 N.Y.S.2d 7, 14-15 (1974) (comparing landmarks law to confiscatory zoning); Trustees of Sailors' Snug Harbor v. Platt, 53 Misc. 2d 933, 280 N.Y.S.2d 75, 78 (1967) (relation of landmark control to general welfare is less direct than relation existing in zoning); 2 P. ROHAN, *supra* note 1, § 7.01[2], at 7-11. For the opinion of Justice Rehnquist on the issue, see note 134 *infra*.

[113] *See* Pyke, *supra* note 1, at 400-02.

[114] *Id.* at 400.

[115] *See generally* 2 R. ANDERSON, *supra* note 1, §§ 11.05-.07.

ments or development districts (shopping centers and apartment projects, for example) the exact location of which is undetermined.[116] Among the cities employing floating zones to meet preservation objectives are Philadelphia, Pennsylvania,[117] Providence, Rhode Island, Los Angeles, California, and Lake Forest, Illinois.[118] Through use of the mini-district tool, one or two plots are provided with a classification, even though preservation requirements are not imposed on surrounding properties.[119] Presumably, it is this type of zoning device which prompted one commentator to remark: "the urban landmark is simply a collapsed version of a historic district, facing similar architectural controls."[120]

Despite the flexibility offered in theory and practice by floating zones and mini-districts, whether or not isolated landmark controls would withstand ultimate constitutional scrutiny remained unclear until the 1978 decision of *Penn Central Transportation Co. v. City of New York*.[120.1] In this 6-3 decision the Supreme Court upheld New York City's use of its Landmarks Preservation Law to forbid construction above Grand Central Terminal.[121]

III. The Penn Central Case

In 1968 Penn Central Transportation Co. (Penn Central), owner of Grand Central Terminal, had entered into a lease with UGP Properties, Inc. (UGP) for the construction of a multistory office complex above the terminal. The previous year, how-

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[116] *See* Pyke, *supra* note 1, at 401 (noting that the possibility remains that a floating zone can be "unhorsed" as spot zoning).

[117] *See* Tinkcom, *The Philadelphia Historical Commission: Organization and Procedures*, 36 L. & Contemp. Prob. 386, 390-95 (1971) (city-wide regulations attaching only to certified buildings).

[118] *See* Note, *Land Use Controls in Historic Areas*, *supra* note 1, at 394 nn.104 & 105 (listing cities with either fixed or floating zones as part of preservation program).

[119] *See* Pyke, *supra* note 1, at 401 (commenting that once established, the mini-district would operate much as a regular zoning classification).

[120] Beckwith, *supra* note 1, at 107. Beckwith's approach to preservation expresses special concern for the burden cast upon property owners, especially where there is a low level of pre-existing preservation in the area. *Id.* at 110.

[120.1] 438 U.S. 104 (1978).

[121] *Id.* at 138.

ever, the terminal had been designated a historic landmark under the city's Landmark Preservation Law.[122] Under this law, an owner wishing to alter a designated site must seek approval of the Landmark Preservation Commission.[123] Where an owner demonstrates that the property is incapable of earning a reasonable return, however, the city has three choices: devise a plan acceptable to the owner under which a reasonable return can be earned; commence eminent domain proceedings; or allow the owner to proceed with alterations.[124] As an additional incentive, landmark owners may be afforded the privilege of transferring air space development rights from the landmark site to another lot, thereby expanding the developmental potential of the transferee lot.[125]

In seeking the required certificate of appropriateness, Penn Central and UGP submitted two designs but neither was found acceptable.[126] The commission was appropriately concerned as to the effect of the proposed construction upon the majestic view of the terminal from the south. The overall response is fairly characterized by the following excerpt from the commission's finding:

> But to balance a 55-story office tower above a flamboyant Beaux-Arts facade seems nothing more than an aesthetic joke. Quite simply, the tower would overwhelm the Terminal by its sheer mass. The 'addition' would be four times as high as the existing structure and would reduce the Landmark itself to the status of a curiosity.[127]

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[122] New York, N.Y., Charter & Administrative Code, ch. 8-A, § 205-1.0 (1976), enacted pursuant to N.Y. GEN. MUN. LAW § 96-a (McKinney 1977). Penn Central had opposed the terminal's landmark designation but had not sought judicial review. 438 U.S. at 116.

[123] New York, N.Y., Charter & Administrative Code, ch. 8-A, § 207-5.0, -6.0, -8.0 (1976). Three separate procedures are available: application for a certificate of no effect upon historical features; application for a certificate that architectural values would not be unduly hindered; and application for a certificate of appropriateness on the ground of insufficient return from the property in its existing state. *Id. See* 438 U.S. at 112.

[124] 438 U.S. at 112-13 n.13.

[125] *Id.* at 113-14.

[126] *Id.* at 116-18. Under one design, a 55-story building was to be cantilevered above the terminal. Under the second, a 53-story building would be erected and portions of the old facade were to be destroyed. *Id.*

[127] *Id.* at 117-18.

Rather than seek judicial review of the denials by the commission, Penn Central and UGP challenged the action as a taking without just compensation under the fifth amendment and as an arbitrary deprivation of property without due process as guaranteed by the fourteenth amendment.[128] The trial court's grant of an injunction against application of the law[129] was reversed by the New York Supreme Court, Appellate Division.[130] This reversal was affirmed by the New York Court of Appeals[131] and, as previously noted, by the United States Supreme Court.[132]

The Court recognized that the appellants, Penn Central and UGP, were essentially urging "that any substantial restriction imposed pursuant to a landmark law must be accompanied by just compensation if it is to be constitutional."[133] In rejecting this proposition, the Court analogized preservation laws with land-use controls approved in previous decisions, finding zoning to be the "classic example" of such controls.[134] Moreover, the

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[128] *Id.* at 118-19.

[129] *Id.* at 119 (the question as to damages from the taking was severed).

[130] Penn Central Transp. Co. v. City of New York, 50 A.D.2d 265, 377 N.Y.S.2d 20, 28-29 (1975) (plaintiffs were required to show deprivation of all reasonable beneficial use and succeeded only in showing deprivation of the most profitable use). The dissent emphasized the difference between zoning and landmarks preservation and offered praise of the proposed design. 377 N.Y.S.2d at 31, 40 (Lupiana, J., dissenting).

[131] Penn Central Transp. Co. v. City of New York, 42 N.Y.2d 324, 337, 366 N.E.2d 1271, 1279, 397 N.Y.S.2d 914, 922 (1977).

[132] The majority paid due respect to the ideals and objectives of historic preservation in stating:

> These nationwide legislative efforts have been precipitated by two concerns. The first is recognition that, in recent years, large numbers of historic structures, landmarks, and areas have been destroyed without adequate consideration of either the values represented therein or the possibility of preserving the destroyed properties for use in economically productive ways. The second is a widely shared belief that structures with special historic, cultural, or architectural significance enhance the quality of life for all. Not only do these buildings and their workmanship represent the lessons of the past and embody precious features of our heritage, they serve as examples of quality for today.

438 U.S. at 107-08 (footnotes omitted).

[133] *Id.* at 128-29.

[134] *Id.* at 125 (citing City of New Orleans v. Dukes, 427 U.S. 297 (1976) (prohibiting pushcart food sales); Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976) (prohibiting more than one adult theater within a given district); Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning to restrict population density); Berman v. Parker, 348 U.S. 26 (1954) (urban renewal); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (zon-

Court reiterated that a state might properly choose to preserve one class of property at the expense of another.[135]

The appellants had objected to the comparison of the landmarks law with historic district legislation or common Euclidean zoning.[136] This objection was echoed in the dissenting opinion of Justice Rehnquist.[137] Though conceding that historic district controls were different in their application to all property within a defined area, the Court stated that landmark laws are not like spot zoning[138] and that the comprehensive plan to preserve historic structures throughout the city was antithetical to discriminatory zoning.[139] The appellants were neither solely burdened nor unbenefited. The landmarks law represented a valid legislative judgment that historic preservation benefited "all New York citizens and all structures, both economically and by improving the quality of life in the city as a whole . . . ."[140] Further, the Court found no merit in the argument that a landmark designation is inevitably arbitrary because of the basic subjectivity of questions of taste.[141]

Having thus determined that the landmarks law need not provide compensation *whenever* preservation restrictions ex-

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ing against business and industrial use); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (comprehensive zoning); Welch v. Swasey, 214 U.S. 91 (1909) (building height restrictions)).

[135] 438 U.S. at 125-26 (citing Miller v. Schoene, 276 U.S. 272 (1928) (preserving apple trees at the expense of cedar trees); Hadacheck v. Sebastian, 239 U.S. 394 (1915) (closing brickyard acceptable where operation is inconsistent with neighboring uses)). *See* note 28 *supra*.

[136] Brief for Appellant at 10.

[137] 438 U.S. at 147-48 (Rehnquist, J., dissenting). Justice Rehnquist gave particular emphasis to variances between regular zoning and New York City's landmarks law. Zoning was deemed fundamentally different since that type of control applied over a broad area with the benefits and burdens being evenly shared. In contrast, the burden in the instant case was seen as being "uniquely felt" and not offset by any benefits. *Id.* See note 28 and accompanying text *supra* with respect to the reciprocity of benefits rationale in zoning.

[138] *See* notes 44 and 45 and accompanying text *supra*.

[139] 438 U.S. at 132. See note 37 and accompanying text *supra* as to the role of the comprehensive plan.

[140] 438 U.S. at 134.

[141] *Id.* at 132. Thus, the Court dealt a telling blow to one of the traditional arguments against aesthetically based controls: the lack of objective standards. *See* note 58 and accompanying text *supra*.

ceeded ordinary zoning restrictions, the Court continued with adjunctive considerations of inverse condemnation. Was the *instant application* of the law an interference with property rights of such magnitude as to necessitate the payment of just compensation?[142] The Court reasoned that since there was no interference with the use of the building as a terminal, since there was no denial of a reasonable return, and since the possibility existed of transferring the terminal's air development rights to nearby Penn Central properties, compensation was not necessary.[143] Appellant's reliance on *United States v. Causby*,[144] which had upheld an inverse condemnation challenge where military flights over a chicken farm had destroyed the use of the property for that purpose,[145] was easily dismissed.[146] The Court found that historic preservation was not even remotely similar to the governmental enterprise involved in *Causby*, and that in *Penn Central* there was no destruction or impairment of the present use of the terminal building as a railroad facility and rental complex.[147]

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[142] This second hurdle follows from the traditional zoning rule that otherwise valid enactments can become invalid under a given set of facts. *See* notes 26 and 100 and accompanying text *supra*.

[143] 438 U.S. at 136-37. While the Court acknowledged that the city's program for transferring air development rights was far from ideal, the possibility of transferring air rights was seen as a factor mitigating any economic loss to Penn Central.

The dissenting opinion favored a remand for a determination of whether the transferable development rights constituted a " 'full and perfect equivalent for the property taken.' " (quoting Monongahela Navigation Co. v. United States, 148 U.S. 312, 326 (1893)). 438 U.S. at 150 (Rehnquist, J., dissenting). For critiques of the New York program and comparisons to other proposals, see Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 585 (1972) (transfer program of limited utility due to restrictions on the distance to which rights can be transferred); Note, *Development Rights Transfer and Landmarks Preservation—Providing a Sense of Orientation*, 9 URB. L. ANN. 131, 142-43 (1975) (possible solution to landmarks dilemma but lacking in flexibility).

[144] 328 U.S. 256 (1946).

[145] *Id.* at 266-67.

[146] 438 U.S. at 134-36. The dissent, however, found a taking in that the air rights restrictions constituted "a non-consensual servitude not borne by any neighboring or similar properties." *Id.* at 143 (Rehnquist, J., dissenting).

[147] This point was noted at the outset of the Court's opinion in *Penn Central*. *Id.* at 107.

IV. Mississippi Legislation

Before discussing Mississippi legislation in detail, some consideration of national developments is in order. All fifty states now have some kind of historic preservation legislation.[148] Of course, it is beyond the scope of this Comment to survey the range of these diverse and multi-faceted enactments. It is, however, useful to recognize the principal features recurring in the laws. Discussion of specific Mississippi city ordinances will also be undertaken in the following section.

A. A Nationwide Overview of Legislation

As a prefatory point of reference, it should be recognized that some state enactments focus only upon special properties (for example, state-owned buildings or archaeological finds) and are not intended to be part of an overall scheme of preservation.[149] At the same time, it must be recognized that important local initiatives have been undertaken under the authority of only general purpose planning or zoning enabling acts.[150] This, in turn, is in contrast to the practice of several states which have proceeded on the basis of constitutional grants of authority.[151] In light of the legitimacy afforded historic preservation laws by *Penn Central* and various lower court decisions, a constitutional approach is no longer necessary; it is, however, equally clear that the complexities and burdens involved continue to require carefully tailored legislation.[152]

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[148] *See* Beckwith, *supra* note 1, at 160-225 (appendix outlining legislation in all the states); Wilson & Winkler, *supra* note 1, at 329-47 (general overview of state legislation).

[149] *See, e.g.*, Miss. Code Ann. § 39-5-51 (1972) (relinquishing custody of last home of Jefferson Davis to United Sons of Confederate Veterans); *id.* § 39-7-29 (penalizing defacing of Indian carvings); *id.* § 39-7-33 (penalizing destruction of historical structures, markers or artifacts).

[150] See notes 105 through 107 and accompanying text *supra* discussing the passage of preservation measures in Santa Fe and the District of Columbia without specific enabling legislation. In Mississippi, the cities of Natchez and Vicksburg both passed historic district ordinances on the basis of zoning enabling legislation. *See* text following note 178 *infra*.

[151] Del. Const. art. 2, § 25; La. Const. art. 6, § 17; Mass. Const. amend. LI; Mo. Const. art. 3, § 48; Tex. Const. art. 16, § 39.

[152] *See* 3 N. Williams, *supra* note 1, § 71A.06 (Supp. 1977) at 86-87 (broadened scope of preservation calls for very careful approaches to standards and

Among the common features of the various preservation enactments are tax incentives to spur private action. These take the form of exemptions, abatements, or credits for restoration expenditures.[153] A more prevalent element, however, is a provision delegating to a state agency the responsibilities of conducting surveys of historical properties, coordinating local programs, and garnering funding and expertise from federal and private sources.[154] Certain powers should also be delegated to subdivisions of the state, since preservation is primarily a local concern. In this regard, a local operating body, a board or commission, is typically authorized.[155] The requirement of such bodies parallels the standard requirement of commissions for the preliminary review of general zoning determinations.[156] The role of historic commissions may be advisory, administrative, or coercive; but in any event commission action must be in accord with due process.[157] A workable standard of historicity should be followed and appropriate notice and hearing must be provided. Appeal is to the parent unit of local government and then to the courts. Authority vested in the commission will vary with the role envisioned for it. The more innovative statutes grant to local governments, if not the commissions, the power to acquire through eminent domain fee interests, negative easements (usu-

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implementation).

[153] *See, e.g.*, CONN. GEN. STAT. ANN. § 12-127a (West 1972) (abatement available where tax rate may force owner to demolish a structure of historical or architectural merit); MISS. CODE ANN. § 27-31-1(d) (Supp. 1979) (exempting all real or personal property belonging to any historical association and used on a non-profit basis); N.J. STAT. ANN. § 54:4-3.52 (West Supp. 1979) (certified historic sites belonging to non-profit corporations exempt from taxation); N.M. STAT. ANN. § 18-6-13 (Supp. 1978) (exemption for amounts expended in restoration; carry-over for 10 years); VA. CODE § 10-139 (1978) (landmark designation recognized as reducing commercial value). For a more detailed treatment, see Wilson & Winkler, *supra* note 1, at 341-45.

[154] See text following note 161 *infra* as to the role of the Mississippi Department of Archives and History.

[155] *See* 2 P. ROHAN, *supra* note 1, § 7.03[2] at 7-44 to -48 (discussing the role of commissions). *See* notes 157 through 160 and accompanying text *infra*.

[156] *See* 1 A. RATHKOPF, *supra* note 3, § 10.02, at 10-6 to -7 (explaining that most states' enabling acts require the appointment of an advisory commission); *cf.* MISS. CODE ANN. § 17-1-13 (1972) (governing authorities "may" utilize services of local or regional planning commission).

[157] The concern, as in the general zoning context, should be with reasonableness. *See* notes 23, 35, 90-91 and accompanying text *supra*.

ally covering only facades),[158] or other less than fee interests.[159] Yet the most crucial authority, without which the regulatory capability of any commission would be negligible, is control over new construction, remodeling, and demolition. This power is customarily exercised through building and demolition permit processes. A major distinction exists between those commissions authorized to deny permits and those authorized merely to delay them for a period sufficient to allow sale or at least reconsideration of the alternatives to demolition.[160] Since courts and city officials appreciate the severe economic impact of delays, the most practical approach for preservationists is one of cooperation and compromise.[161] *Maher* and *Penn Central,* however, remain strong bargaining tools for the preservationist.

B. The Mississippi Local Government Historic Preservation Law

The Mississippi Local Government Historic Preservation Law of 1978, Title 39, Chapter 13 of the Mississippi Code,[162] provides adequate power delegations for preservation at the

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[158] For a general introduction to the role of negative easements in preservation, see Beckwith, *supra* note 1, at 130-33; Wilson & Winkler, *supra* note 1, at 339-41.

[159] Wilson & Winkler, *supra* note 1, at 337 (effective historic commission should have power of eminent domain). For an example of an ordinance giving a commission an active role in eminent domain exercise, see DETROIT, MICH., CODE ch. 28-A-1-11(c) (1976), *quoted in* Comment, supra note 5, at 838 n.291:

> The acquisition by purchase or condemnation of property(s), structure(s), easement(s), or other rights, provided the city council determines that ownership is in the public interest. The commission shall make recommendations to the city council on such historic properties to be acquired. The city shall be responsible for the maintenance of historic properties so acquired. Property(s), structure(s), easement(s) or other rights acquired hereunder may be sold or transferred upon the recommendation of the commission and the approval of the city council.

[160] *See* NEW ORLEANS, LA., Vieux Carré Ordinance § 65-8 (allowing denials), *quoted in* Maher v. City of New Orleans, 516 F.2d 1051, 1054 n.5 (5th Cir. 1975), *cert. denied,* 426 U.S. 905 (1976); PORTLAND, OR. MUNICIPAL CODE § 33.120.070 (1973) (120 day suspension of permit with possible extension), *cited in* 2 R. ANDERSON, *supra* note 1, § 9.70, at 266; ALEXANDRIA, VA., CODE §§ 42-96.2, 42-96.3 (three month offer of sale must precede application for permit), *cited in* 2 P. ROHAN, *supra* note 1, § 7.03[2], at 7-46 n.20.

[161] 2 R. ANDERSON, *supra* note 1, § 9.70, at 267.

[162] MISS. CODE ANN. §§ 39-13-1 to-9 (Supp. 1979).

county or municipal level, although the law as a whole offers an incomplete mechanism for effective preservation. Section 39-13-3 delegates the power to establish historic districts and landmark sites. To avoid due process infringement, ordinances are to be adopted only after appropriate investigation and public hearing.[163] Notice of the hearing is to be published once a week for at least three consecutive weeks and is to specify pertinent boundaries and locations.[164]

Section 39-13-5 provides that the county or municipality must establish a "historic preservation commission to preserve, promote and develop the historical resources of such county or municipality . . ."[165] as a prerequisite to the designation of a historic district. Commissions are to consist of five residents "appointed by the governing authority with due regard to proper representation in such fields as history, architecture, urban planning, archaeology, and law."[166]

Section 39-13-7 stipulates that the Mississippi Department of Archives and History is to make an analysis and present recommendations prior to the designation of historic districts.[167] Section 39-13-9 allows appropriations by governing authorities for historic preservation committees, but the section explicitly denies the power of eminent domain to governing authorities for the purpose of preservation.[168]

Denial of the eminent domain power would be a serious hindrance to the preservation cause but for an earlier statutory provision authorizing county boards of supervisors to acquire historic sites "by gift or grant."[169] Curiously, the 1978 law is silent in other respects as to the nature of regulatory measures which may be taken by commissions regarding the establishment and perpetuation of historic districts and landmarks. A broad read-

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[163] Ordinances are to be adopted "after investigation of the historical, architectural, archaeological and cultural significance of the buildings" and sites. MISS. CODE ANN. § 39-13-3 (Supp. 1979).

[164] *Id.*

[165] *Id.* § 39-13-5 (Supp. 1979).

[166] *Id.*

[167] *Id.* § 39-13-7 (Supp. 1979).

[168] *Id.* § 39-13-9 (Supp. 1979).

[169] *Id.* § 39-5-17 (1972).

ing of the Commission's power is possible from the "preserve, promote and develop" language of section 39-13-5, although the section seems to contemplate an advisory role for them. For this reason, a clearer statement of the function of historic preservation commissions is needed. This need may be painfully obvious when commission actions are not in accord with actions of those units of local government responsible for the administration of general laws of zoning, planning, construction and demolition. For example, structures with real potential for preservation might be deemed unsafe and suffer demolition under a building code ordinance.[170] Similarly, owners of structures with no particular historic or aesthetic appeal may seek to delay appropriate action under building codes by resort to preservation procedures. Until a clearer statement of commission authority is formulated it cannot be supposed that the various city or county officials will be of a like mind when faced with such problems.

Also noticeably lacking in the statutes is any attempt to specify standards of historicity or architectural merit. "Historic district" and "landmark" are not even defined. The repeated use of the word "historic" and the absence of other phrases indicating specific criteria pose one of the major dilemmas for interpreters of the act. The modern trend is for preservation to go beyond the few structures in any community identified with specific historical events or personages.[171] The *Penn Central* and *Maher* decisions involved some of the most prominent symbols of this nation's past, but there is no language in these opinions indicating that preservation controls are acceptable only for sites of comparable significance. In fact, Justice Brennan notes with apparent approval in *Penn Central* that the New York law has resulted in the designation of thirty-one historic districts and over four hundred landmarks.[172] The quality sought to be preserved in preservation is a spiritual one recognizable in all structures typical of an era which could be in the distant or not-so-

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[170] *See* SOUTHERN BLDG. CODE CONG. INT'L, INC. STANDARD BLDG. CODE § 103.4(a) (1976) (all buildings which are unsafe, unsanitary, without adequate egress, or otherwise dangerous to human life shall be abated by repair or demolition).

[171] *See* 3 N. WILLIAMS, *supra* note 1, § 714.05 (Supp. 1977) (discussing the shifting emphasis in preservation).

[172] 438 U.S. at 134.

distant past. Following this logic, the traditional emphasis in Mississippi upon antebellum homes should not limit appreciation of other distinctive and aesthetically valuable sites. While this broader notion of "historic" can be discerned in the act, it seems possible as well to adopt the more pedestrian view.

Rather than encumber the preservation law with technical definitions, the better approach would be to require that each community adopting preservation controls publish operational standards. Publication would obviously militate against charges of caprice. Publication need not be contemporaneous with the enactment of an ordinance[173] and, perhaps should not be, since the commission or board of review created by the ordinance would logically play a significant role in the formulation of such standards. The "due regard" criterion prescribed in section 39-13-5 as to commission representation becomes all the more important in this context; however, such language unfortunately does not rule out the possibility that commission membership in some communities might lack the necessary architectural and planning expertise. The most important safeguard in the Act respecting the issue of formulation of standards is, or seems to be, that proposed historic district and landmark controls are subject to scrutiny by personnel of the archives and history department.[174]

An additional observation regarding the Mississippi statutes is that there is no special distinction drawn between historic district and landmark ordinances. While the bottom line of *Penn Central* is a stamp of approval for reasonable landmark controls, it is indisputable that such controls entail substantially different considerations than do district controls. The failure of Mississippi legislation to provide guidelines tailored to each approach is thus unfortunate. Particularly, there should be statutory recognition of the floating zone. Actually, it is an oddity of the Mississippi preservation law that neither the zoning power nor even a cross-reference to general zoning statutes is mentioned. Appar-

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[173] The *Maher* decision remains the principal guiding force with regard to standards. *See* notes 91 through 93 and accompanying text *supra*.

[174] The requirement is not an uncommon one in the various state enabling acts. *See, e.g.*, LA. REV. STAT. ANN. § 25:731 (1975); MICH. STAT. ANN. § 399.203 (1976).

ently the legislature, unlike the dissenters in *Penn Central,* was not concerned with "fish or fowl" categorizations; it was sufficient that historic preservation derives from the same police power base as zoning. Yet it is difficult to analyze preservation laws without falling back upon zoning concepts. If the statutes contemplate enactments that are at least analogous to zoning, considerations of reasonableness[175] and other fundamentals of zoning cannot be avoided. Since the national trend shows that objections to aesthetically-based zoning are no longer persuasive, and since the *Penn Central* decision dissolved the same objections regarding historic districting and landmark preservation,[176] it appears that the Mississippi Supreme Court decision in *City of Jackson v. Bridges*[177] is little more than a curiosity piece.

While the 1978 Mississippi preservation law has notable omissions and weaknesses, it should pass constitutional scrutiny. It should be remembered that despite this broad legitimacy of preservationist methods, the traditional rule that local police power measures are subject both to facial attack and to limitations in individual circumstances, is in no way diluted.[178]

C. Ordinances of Mississippi Cities

Omissions or weaknesses in legislation at the state level can be at least partially remedied through effective drafting of local ordinances. In Mississippi, the Vicksburg and Natchez historic district ordinances, enacted long before the state's 1978 preservation law,[179] were a major step forward for preservation and may well serve as an incentive for enactments by other Mississippi communities. The potential offered by the Vicksburg ordinance is revealed in its statement of purposes:

1. to promote and preserve the general welfare of the inhabi-

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[175] *See* text beginning at note 15 *supra.*

[176] *See* note 141 and accompanying text *supra.*

[177] *See* note 56 and accompanying text *supra.*

[178] The most liberal readings of *Penn Central, Maher* and general zoning law cannot diminish this requirement. *See* notes 26, 100, and 142 and accompanying text *supra.*

[179] It would seem that upon the basis of City of Santa Fe v. Gamble-Skogmo, Inc., 73 N.M. 410, 389 P.2d 13, 17 (1964) (approving historic controls without preservation-oriented enabling legislation), there should be no serious question as to the reliance by Natchez and Vicksburg upon general zoning enabling acts.

tants of the City of Vicksburg . . .;
2. to protect and preserve property values and to advance the prosperity of the community;
3. to protect, preserve and improve the appearance of the city of Vicksburg;
4. to preserve the distinctive and historic character, charm and beauty of the City of Vicksburg, so that the value to the community of those buildings, grounds, and approaches having architectural and historic worth may not be impaired;
5. to prevent developments obviously incongruous to the historic aspects of the surrounding;
6. to encourage new developments reflecting and adding to the historic atmosphere, character, charm and beauty of the community;
7. to develop and maintain appropriate settings and environment for historic preservation and appropriate new development;
8. to improve the environment of the urban area and the quality of life within the urban area for the general welfare of all citizens of this municipality.[180]

Attention should be drawn to the stated purpose of preventing incongruous developments. This objective is comparable to the concern for the *tout ensemble* voiced in *City of New Orleans v. Pergament.*[181] The importance of this feature cannot be overstated. Historic preservation does not require static neighborhoods, but rather, seeks to ensure that the growth which is inevitable proceeds in harmony with the qualities sought to be preserved. The related purpose, stated in the ordinance, of encouraging new developments adding to the historic atmosphere bears out this intention. But just as the district court in *Maher v. City of New Orleans* was wisely skeptical of new replicas of the past,[182] so must be the administrator of any preservation ordinance. Poorly designed imitations of building styles from the past will do far more harm than good.

The Vicksburg district is delineated in precise terms by a section of the ordinance. A map of the district is adopted as part

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[180] VICKSBURG, MISS., CODE App. C § 800 (1959 and Supp. No. 26 1973).
[181] *See* note 76 and accompanying text *supra.*
[182] *See* note 89 and accompanying text *supra.*

of the ordinance; therefore, the controls are not in the nature of a floating zone. Significantly, property within the historic district will continue to be under city-wide zoning controls. By express language of the ordinance the establishment of the district is not to be construed as the repeal or waiver of any other portion of the zoning ordinance.[183] Thus the historic controls are but a superimposition of appearance standards; pre-existing Euclidean use classifications are unchanged.[184] The ordinance is nonetheless implemented as a zoning measure.[185]

The Vicksburg ordinance creates a seven member board of architectural review. The board is to include at least one architect and no less than two residents or property owners from the district.[186] A certificate of appropriateness from the board is required prior to any construction, alteration, repair, demolition, movement of buildings, or cutting of live trees of a stated size. Minor repairs are exempt from review unless they perpetuate or create a nonconforming condition.[187] In ruling upon applications, the board is to consider:

> the general exterior design and appearance of the building, structure or site as proposed to be changed, including: (1) height; (2) mass; (3) textures; (4) materials; (5) colors; (6) plot plan or site layout, including features such as walls, walks, terraces, plantings, signs, lights and other appurtenances; and (7) the relationship of these and the proposed changes to the immediate surroundings, to the Historic Vicksburg District and to the comprehensive plan for the City of Vicksburg.[188]

The board is to promulgate such standards as are necessary to inform the public of approval criteria for applications for cer-

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[183] VICKSBURG, MISS., CODE App. C § 802 (1959 and Supp. No. 26 1973).

[184] Since there is no modification of use classifications, it appears that the requirements of the change or mistake rule, effective as to Mississippi zoning amendments, are not brought into play. *See* Gatlin v. City of Laurel, 312 So. 2d 435, 439 (Miss. 1975) (to apply change or mistake rule it must be determined that change from one classification to another exists).

[185] Reference is made in VICKSBURG, MISS., CODE App. C § 800 (1959 and Supp. No. 26 1973) to encouragement of purposes set forth in MISS. CODE ANN. § 3592 (1942) (declaring the general purposes for zoning legislation in the state).

[186] VICKSBURG, MISS., CODE App. C § 803 (1959 and Supp. No. 26 1973).

[187] *Id.* § 807.

[188] *Id.* § 806.

tificates of appropriateness.[189] When an application is denied, written reasons for disapproval are to be provided.[190] Appeal is to the mayor and board of aldermen and then to the courts.[191]

Natchez was the first Mississippi city to enact land use controls of a preservationist nature; the principal architectural control ordinance dates from 1955. As amended in 1978, this ordinance establishes a Historic Natchez District and provides for architectural review of all proposed construction within the district by the city planning commission.[192] The planning commission is authorized to certify buildings of historic significance and apply for federal historic designation under the Historic Preservation Act of 1966. Architectural review is to involve considerations quite similar to those specified in the Vicksburg ordinance, *viz.*: "exterior design and appearance of the proposed building, including materials, textures, and colors, plot plan or site layout, including features such as walls, walks, terraces, plantings, accessory buildings, signs, lights, and other appurtenances; and relation of the building to the immediate surroundings and to the Historic Natchez District."[193] As in the Vicksburg ordinance, it is clear that preservation regulations are not to extend to building interiors and not to disturb land use patterns as governed by the zoning ordinance. Building plans forwarded to the planning commission are to be reviewed and decided upon within thirty days. If no action is taken within this time, the plans will be deemed approved.[194]

The time limit feature is one of two major differences between the Vicksburg and Natchez ordinances. Thirty days is perhaps too short a period for a proper decision, but some limit beyond which boards or commissions cannot delay private property dispositions is a desirable counterbalance against the possible abuse of landowners' rights. It is clear, however, that in both cities a decision against the landowner's application works not just to delay his proposed action but to bar it, subject to a suc-

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[189] *Id.*
[190] *Id.* § 809.
[191] *Id.* § 810.
[192] NATCHEZ, MISS., CODE App. C § II (1969 and Supp. No. 20 1978).
[193] *Id.*
[194] *Id.* § I.

cessful appeal.[195]

The second major difference lies in Vicksburg's utilization of a special architectural review board and Natchez's reliance upon a multi-purpose planning commission. The Vicksburg approach is roughly compatible with the requirements of section 39-13-5 of the state preservation law, although Vicksburg requires only one professional representative—an architect.[196] The Natchez ordinance is seemingly more errant with respect to the state law; however, the use of the planning commission could be a positive feature if its end result is fewer inter-agency difficulties and more uniformity in overall policy. In any case, since the Natchez and Vicksburg ordinances were enacted under general zoning power delegations, it does not appear an absolute necessity that these ordinances be brought into full compliance with the 1978 state law.

Until this point, the discussion of the Natchez controls has touched only the 1955 ordinance and its amendments. Confusingly, a planning ordinance was enacted in 1971 creating a historic district comprising all property within the city limits.[197] Under the 1971 ordinance, demolition or exterior alterations of structures constructed prior to 1900 requires the approval of a seven member commission created by the ordinance.[198] Like the ordinance of Deering, New Hampshire, previously discussed,[199] the commission's discretion is almost unlimited. Such guidance as does exist occurs in the provision that, "The Commission review shall not consider interior arrangement or interior design; nor shall it make requirements except for the purpose of preventing developments which are not in harmony with the prevailing character of Natchez, or which are obviously incongruous with this character."[200] The vagueness of this ordinance is obvious. If attacked, its justification could conceivably lie in analogizing architectural traits of old Natchez to the atmosphere of the town of Deering, which the New Hampshire court found

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[195] *See* note 160 and accompanying text *supra*.

[196] *See* note 166 and accompanying text *supra*.

[197] NATCHEZ, MISS., CODE, art. 3, §§ 23-51 to -56 (1969 and Supp. No. 5 1971).

[198] *Id.* § 23-54.

[199] *See* notes 108 and 110 and accompanying text *supra*.

[200] NATCHEZ, MISS., CODE, art. 3, § 23-55 (1969 and Supp. No. 5 1971).

so readily observable that explicit standards were not necessary.[201]

Neither of the Mississippi ordinances provides relief to owners of affected property other than through normal channels of appeal. It is unclear what, if any, consideration is to be allowed for an owner's right to reasonable return[202] from his property. The absence of tax incentives for restoration is particularly regrettable. Moreover, both ordinances set forth demolition controls with far too few procedural guidelines and the relation of relevant building code provisions to preservation mandates is an area of confusion.[203]

V. Conclusion

The major failing of historic preservation is that it has come too late. Too much has already been lost. This loss has not only

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[201] *See* note 110 and accompanying text *supra.*

[202] *See* note 206 and accompanying text *infra.*

[203] The latest preservationist ordinance of a zoning nature to be proposed for a Mississippi municipality is a "neighborhood conservation ordinance" which would provide for protected areas within the city of Jackson. The Jackson proposal differs in a number of respects from existing enactments in Vicksburg and Natchez. For instance, the proposed ordinance would not in itself establish historic or conservation districts; rather, the ordinance would create a Historic Preservation Commission and establish a procedure for the designation of conservation districts within city limits. Neighborhood Conservation Ordinance art. 3, 8. The ordinance broadly defines conservation districts as areas of "architectural and/or historical significance." *Id.* art. 4. Petitions for the establishment of districts are to require the signatures of 20% of the real property owners within the affected area; final decision as to district designation is to rest with the city council, after review by the Mississippi Department of Archives, Jackson City Planning Board, and Historic Preservation Commission. *Id.* art. 10. Also, the proposal envisions the creation of separate seven member architectural review boards for each conservation district. *Id.* art. 6. In these respects there is much similarity to floating zones prominent in landmark preservation, *see* note 111 and accompanying text *supra*, although supporters of the Jackson ordinance seek neighborhood controls. *See* Clarion-Ledger Jackson Daily News, Mar. 19, 1979, §1B, at 1, col. 1. A further feature of the proposal is that the ordinance would not allow a board of architectural review to bar demolition or renovation where an owner's right to a reasonable return would be jeopardized. Neighborhood Conservation Ordinance art. 7, § 2(b).

Efforts to gain passage of the ordinance have met a number of objections from the Jackson Board of Realtors, Inc., among which are whether the ordinance is authorized under the state's 1978 preservation law and whether a reasonable basis for conservation districts exists within the city. Memorandum of McDavid, Edmonson, Bennett, Lotterhos & Sulser, attorneys for the Jackson Board of Realtors, Inc. (April 23, 1979). *See also* Clarion-Ledger Jackson Daily News, November 4, 1979, § 1-I, at 1, col. 1.

been of the structures themselves but also of the artisan skills which gave old structures the flavor so lacking in modern construction. Of course, a second problem area is cost; however, the real cost is elusive. Expenditures by local governments are best directed toward preservation of public properties and administration of appropriate land use controls. To this end, federal funding sources should be tapped whenever possible. But private investment has been and must remain the greatest source of preservation funding. Businessmen must realize that the private sector will more than adequately share in the rewards of historic preservation through the bolstering of property values, the lessening of surburban flight, the prevention of urban decay, and the increase in tourism. Without this understanding there will never be the level of community support needed to make even the best of ordinances achieve their goals.

Since much of the old has now been replaced, many cities will have an inadequate basis for the establishment of historic districts. City or county-wide districts for the control of scattered structures appear too sweeping and likely to result in unnecessary administrative delays to the average landowner. A floating zone approach, allowing a more selective application of restrictions to individual landmarks or mini-districts, is the more sensible approach. Since natural, relatively homogeneous districts such as in New Orleans or Deering are the exception, the question of standards must be addressed more directly by most communities. This issue is most crucial when the ordinance controls disharmonious modern construction.[204]

While the New York City landmarks law tested in *Penn Central* has been subjected to much criticism, it does provide a reference point for future urban landmark regulations. The assurance in the law of the property owner's right to a reasonable return was of significant import to the Supreme Court, although it appears something less than a *sine qua non*. An ordinance with this feature will obviously be on firmer ground, but there is little reason to believe that the approach of the *Maher* decision—that of requiring total diminution in value for a tak-

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[204] *See* notes 103, 104 and accompanying text *supra*.

ing[205]—is foreclosed by the *Penn Central* Court's ponderings of reasonable return under New York City's law.[206]

To the extent that the *Penn Central* decision relies upon the New York scheme's allowance of air development rights transfer, the reasoning is of less applicability in non-urban areas where such rights would be valueless. It is the view of this Comment, however, that only tangential attention was paid by the Court to these technical aspects. The essence of the decision is the clear affirmation that historic preservation improves the quality of life, serves the general welfare, and is to be countenanced subject to customary considerations of reasonableness. In this sense *Penn Central* is persuasive authority for landmark or district controls in the urban or rural context, in New York City or the smallest Mississippi community. Perhaps it is true that there is nothing exactly like Grand Central Terminal in this state, but it is equally true that almost every Mississippi community has its own equivalent and that the reminders of our cultural growth, both large and small, are as varied as our rich historical traditions and as the land itself.

W. Roger Jones, Jr.

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[205] 516 F.2d at 1066. *See* text accompanying notes 98 and 99 *supra.*

[206] Reasonable return arose as an issue in the *Penn Central* case, in the first instance, not as a matter of constitutional law but through the procedural dictates of the landmarks law. *See* note 124 and accompanying text *supra.* The constitutional question remained whether there had been a confiscation, and the right to reasonable return was but one factor in this determination. *See* notes 142 and 143 and accompanying text *supra.*

THE SEVENTH AMENDMENT AND COMPLEX CIVIL LITIGATION: THE DEMISE OF THE COMPLEXITY EXCEPTION TO TRIAL BY JURY AND THE SEARCH FOR A VIABLE DUE PROCESS ALTERNATIVE

The civil jury, although well entrenched in the judicial system of the United States, has traditionally been surrounded by controversy.[1] The most recent quarrel with the jury has focused upon its ability to make rational decisions in complex civil litigation. In order to appreciate fully the merits of this dispute one must be cognizant of the continuing debate concerning the use of juries in civil cases.

The proponents of the civil jury allege that the strengths of the institution far outweigh its weaknesses. Frequently cited justifications for the civil jury include: (1) the importance of the civic experience provided for the jurors;[2] (2) the ability of a jury to make the stringency of certain decisions tolerable to the public;[3] (3) the use of the jury to prevent graft and to guarantee the integrity of the trier of fact;[4] (4) the jury's removal of animosity and suspicion from the judiciary thus strengthening the credibility of the court with the public;[5] and (5) the infusion of commu-

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[1] *See* H. KALVEN, JR. & H. ZEISEL, THE AMERICAN JURY 4-7 (1966). Chief Justice Burger, an outspoken critic of the civil jury, has fanned the flames of the debate on the need and effectiveness of the jury system. *See, e.g.*, Burger, *Agenda for Change*, 54 JUD. 232, 234-35 (1970). For an analysis and response to the Chief Justice's evaluation of the civil jury see Higginbotham, *Observation—Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 47-48 (1977).

[2] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 7; Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055, 1062 (1964); Karcher, *The Case for the Jury System*, 45 CHI.-KENT L. REV. 157, 168 (1968-69); Zeisel, *The American Jury*, in ANNUAL CHIEF JUSTICE EARL WARREN CONFERENCE ON ADVOCACY IN THE UNITED STATES, THE JURY SYSTEM: THE FINAL REPORT 67 (1977) [hereinafter cited as THE JURY SYSTEM]. This justification for the jury system was best articulated as follows: "[s]erving on a jury, with the possible exception of voting, is often the only opportunity the average citizen has to participate in his government." Mackoff, *Jury Selection for the Seventies*, 55 JUD. 104, 104 (1971).

[3] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 7; Kalven, *supra* note 2, at 1062; Zeisel, *supra* note 2, at 67.

[4] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 7-8; Junata, *Pros & Cons of Jury Trials*, 11 FORUM 590, 596-97 (1976); Kalven, *supra* note 2, at 1062; Zeisel, *supra* note 2, at 67.

[5] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 7; Higginbotham, *supra* note 1, at 56-58; Kalven, *supra* note 2, at 1062.

nity values into the judicial process and subsequent allocation of judicial power.[6]

Critics of the civil jury contend that it is an antiquated institution that cannot function efficiently in a twentieth-century environment. They assert that the jury has inherent weaknesses including: (1) the inordinate amount of time required in jury trials increases court congestion and delay;[7] (2) the expense and administrative costs required to maintain juries are excessive;[8] (3) the imposition of an unfair social cost on persons required to serve as jurors;[9] (4) the susceptibility of jurors to courtroom dramatics and emotional appeals;[10] (5) the effect of jury service as disenchanting citizens with the judicial process;[11] and (6) the failure of the jury to find the facts correctly and follow the law.[12]

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[6] Higginbotham, *supra* note 1, at 58-60 (the jury serves as a mechanism for expressing public law and serves to lessen the power of the appellate court); Rendleman, *Chapters of the Civil Jury*, 65 KY. L.J. 769, 795 (1977) (the jury decides a case as the law ought to be); Saltzburg, *The Unnecessarily Expanding Role of the American Trial Judge*, 64 VA. L. REV. 1, 19 (1978) (juries control bureaucracy and prevent governmental oppression).

[7] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 8; Harley, *Where Jury Trial Fails*, 55 JUD. 94, 95 (1971); Kalven, *supra* note 2, at 1059, 1061 (Kalven estimates that jury trials are 40% longer than bench trials); Steuer, *The Case Against the Jury (A Brief Without Citations)*, 47 N.Y. ST. B.J. 101, 143 (1975); Zeisel, *supra* note 2, at 67. *Contra*, Clark, *The American Jury: A Justification*, in SELECTED READINGS: THE JURY 5 (1971) (any difference between jury and nonjury proceedings is small and the jury trial may well be faster).

[8] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 8; Harley, *supra* note 7, at 95; Kalven, *supra* note 2, at 1062; Zeisel, *supra* note 2, at 67. Advocates of civil jury trials deny that the cost of trial by jury exceeds the cost of trying a case before a judge. They contend that the expense of maintaining the jury system is no greater than the cost of nonjury trials due to the necessity of paying additional judges if the jury system were eliminated. Clark, *supra* note 7, at 6; Corboy, *Perspectives on the Function and Value of the Jury in America: From the Bar*, in THE JURY SYSTEM IN AMERICA 181, 185 (R. Simon ed. 1975).

[9] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 8; Kalven, *supra* note 2, at 1062; Zeisel, *supra* note 2, at 67.

[10] *See* Boeder, *The Functions of the Jury: Fact or Fiction?*, 21 U. CHI. L. REV. 386, 393 (1954); Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U.L. REV. 486, 503 (1975). *See generally* Harbinger, *Trial by Drama*, 55 JUD. 122, 126 (1971) (dramatic presentation by counsel is crucial in a criminal case because juror decisions may be made on the basis of the jury's perception of counsel).

[11] H. KALVEN, JR. & H. ZEISEL, *supra* note 1, at 8; Kalven, *supra* note 2, at 1062; Steuer, *supra* note 7, at 141; Zeisel, *supra* note 2, at 68.

[12] Kalven, *supra* note 2, at 1062; Steuer, *supra* note 7, at 141-42; Zeisel, *supra* note

Amid the ongoing debate concerning the viability of the civil jury in American jurisprudence, a recent assault upon the jury has been instigated by those who question the competence of a jury to resolve complex cases. With the development of multinational corporations and the rapid expansion of scientific technology, the difficulty of the fact-finding processes in antitrust, patent, and other complex civil litigation has increased significantly. It was inevitable that courts would be confronted with juries that could not comprehend the facts of a case and therefore could not render rational verdicts.

For the past decade there have been efforts to circumvent the seventh amendment's guarantee[13] of a trial by jury.[14] This comment will attempt to analyze the apparent conflict between

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2, at 68. Statistical data gathered by Professor Kalven indicate that although juries are frequently criticized for finding the wrong verdict, judges generally agree with the jury's decision in 80% of all criminal cases and in 79% of all personal injury cases. Kalven, *supra* note 2, at 1064-65. *See also* Joiner, *Perspectives on the Function and Value of the Jury in America: From the Bench*, in THE JURY SYSTEM IN AMERICA 146, 151-52 (R. Simon ed. 1975) (the greatest value of the jury is its ability to decide cases correctly and to follow the law).

[13] The seventh amendment provides: "[i]n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . ." U. S. CONST. amend. VII. While the amendment gives broad protection to a litigant's right to a trial by jury in civil matters, its scope is limited. First, the amendment does not extend the right to a trial by jury but merely preserves the right as it existed in 1791. F. JAMES, JR. & G. HAZARD, JR., CIVIL PROCEDURE § 8.1, at 347 (2d ed. 1977). Second, the amendment applies only to suits at common law. *See* note 18 and accompanying text *infra*. For an analysis of the Supreme Court's construction of the right to trial by jury in civil cases as guaranteed by the seventh amendment see Annot., 40 L.Ed. 2d 846 (1975).

[14] The dilemma resulting from the constitutional requirement of a jury trial in civil cases and the attempt to ensure a rational verdict has led several commentators to consider exceptions to the seventh amendment for complex litigation. *See generally* Harris & Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y.L.S. L. REV. 611 (1979); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976); Ropski, *Constitutional and Procedural Aspects of the Use of Juries in Patent Litigation*, 58 J. PAT. OFF. SOC'Y 609 (1976); Comment, *Unfit for Jury Determination: Complex Civil Litigation and the Seventh Amendment Right of Trial by Jury*, 20 B.C. L. REV. 511 (1979) [hereinafter cited as Comment, *Unfit for Jury Determination*]; Comment, *The Right to an Incompetent Jury: Protracted Commercial Litigation and the Seventh Amendment*, 10 CONN. L. REV. 775 (1978) [hereinafter cited as Comment, *The Right to an Incompetent Jury*]; Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979) [hereinafter cited as Note, *The Right to a Jury Trial*].

the litigant's right to a trial by jury and his right to a rational decision reached according to the principles of due process of law. Emphasis will be placed upon the search for a viable due process exception to the seventh amendment in the context of complex civil litigation.

I. The Historical Approach to the Seventh Amendment Right to a Trial by Jury

In ascertaining whether the seventh amendment[15] requires a civil action to be tried before a jury, the Supreme Court has traditionally applied the historical test.[16] Under that test, if the action or its nearest historical analogue were triable before a jury at the time of the adoption of the seventh amendment[17] the action would be categorized as legal in nature[18] and would be tried

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[15] *See* note 13 *supra.*

[16] The historical test has been articulated by the Supreme Court as follows: "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791." Dimick v. Schiedt, 293 U.S. 474, 476 (1935). *See also* Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935) (the right to a trial by jury in civil actions is determined by whether the action would have been tried by a jury under the English common law at the time of the adoption of the seventh amendment).

[17] The seventh amendment was adopted in 1791. 5 Moore's Federal Practice ¶ 38.08[5], at 73 (2d ed. 1979). In applying the historical test, however, the 1791 common law practice of England rather than that of the United States is controlling. Baltimore & Carolina Line, Inc. v. Redman, 295 U.S. 654, 657 (1935); United States v. Wonson, 28 F. Cas. 745, 750 (C.C.D. Mass. 1812) (No. 16,750) (the common law of England rather than that of any individual state is determinative of seventh amendment questions); Redish, *supra* note 10, at 486 n.3. *See* Wolfram, *The Constitutional History of the Seventh Amendment,* 57 Minn. L. Rev. 639, 640 (1973). Perhaps one reason that the common law of England served as the cornerstone of the right to trial by jury was that jury practices varied in the different states. *See* Shapiro & Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill,* 85 Harv. L. Rev. 442, 449 (1971). *See also* Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 293-94 (1966) (citing J. Madison, Debates in the Federal Convention) (the variance of jury practices among the states was the basis for the rejection of an amendment to the article III guarantee of trial by jury in criminal cases which would have provided for trial by jury "as usual in civil cases").

[18] Because the seventh amendment is restricted in its application to "Suits at common law," only actions which are legal in nature fall within the scope of its provisions. The Supreme Court has stated that the intent of the framers of the amendment in utilizing the phrase "at common law" was to include:

> suits in which *legal* rights were to be ascertained and determined, in contradis-

by a jury today.

Application of the historical test was problematic because of the difficulty of determining whether an action would have been classified as legal or equitable in 1791.[19] Further complicating the use of the test was the merger of law and equity in the federal system.[20] Criticism of the historical test emphasized its adverse effect upon modern judicial administration[21] and the uncertainty involved in its application.[22]

The Supreme Court initially departed from a strict application of the historical test in *Beacon Theatres, Inc. v. Westover.*[23] In *Beacon Theatres,* the plaintiff, Fox West Coast Theatres,

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> tinction to those where equitable rights alone were recognized, and equitable remedies were administered . . . . [T]he amendment then may well be construed to embrace all suits which are not of equity and admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights.

Parsons v. Bedford, 28 U.S. (3 Pet.) 433, 447 (1830) (emphasis in original).

[19] Professor James has stated that there was never a clear division between the jurisdiction of law and equity due in part to their borrowing from each other. James, *Right to a Jury Trial in Civil Actions,* 72 YALE L.J. 655, 658-60 (1963).

[20] Law and equity were merged in the federal system with the adoption of the Federal Rules of Civil Procedure in 1938. C. WRIGHT, HANDBOOK ON THE LAW OF FEDERAL COURTS § 62, at 292 (3d ed. 1976). This merger led to the creation of one form of action, the civil action. FED. R. CIV. P. 2. The impact of the civil action was to destroy the "[p]urely procedural impediments to the presentation of any issue by any party, based on the difference between law and equity. . . ." Ross v. Bernhard, 396 U.S. 531, 539-40 (1970). *See also* Bradley v. United States, 214 F.2d 5, 7 (5th Cir. 1954) (Federal Rules abolished the formal procedural distinction between actions at law and suits in equity). *But see* Groome v. Steward, 142 F.2d 756, 756 (D.C. Cir. 1944) (the distinction between law and equity is important in determining whether a party is entitled to a jury trial); Chichester v. Kramer, 157 F. Supp. 79, 80 (S.D.N.Y. 1957) (same).

[21] One commentator observed that a strict application of the historical test requires "blind adherence to history [which] would seem to place modern judicial administration in a historical strait jacket, controlled by the policies of a society of 200 years ago." Redish, *supra* note 10, at 487.

[22] In a dissenting opinion, Justice Clark referred to the historical test as "a strain upon history" which justified the majority's "apology that their discussion may seem to reek unduly of the study . . .," to which he added, "if not of the museum." Damsky v. Zavatt, 289 F.2d 46, 59 (2d Cir. 1961) (Clark, J., dissenting).

[23] 359 U.S. 500 (1959). Professor McCoid states that the analysis of the right to trial by jury adopted in *Beacon Theatres* "represents a striking departure from history . . ., [yet a departure that] fits well with the conception of the Constitution as a durable document providing continuingly useful standards for an evolving society." McCoid, *Procedural Reform and the Right to Jury Trial: A Study of Beacon Theatres, Inc. v. Westover,* 116 U. PA. L. REV. 1, 5, 10-11 (1967).

sought a declaratory judgment that its contract to show "first-run" pictures did not violate federal antitrust laws.[24] Beacon, the defendant, filed a counterclaim against Fox requesting treble damages for Fox's alleged antitrust violations[25] and demanding a trial by jury.[26] Although a strict historical analysis would have permitted a court of equity to settle the case in one suit without a jury,[27] the Court held that Beacon was entitled to a trial by jury.[28] Since the traditional basis for the assumption of equitable jurisdiction was the inadequacy of a remedy at law,[29] the Court reasoned that it must consider the expansion of legal remedies since 1791[30] in determining whether the remedy at law was truly adequate, thus entitling the parties to a trial by jury.[31]

In *Beacon Theatres,* the Court fashioned a two-prong test for analysis of the right to a jury trial in a civil action.[32] The Court indicated that the action must be tried by a jury if (1) the

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[24] 359 U.S. 500, 502-03 (1959).

[25] In its counterclaim, Beacon alleged that the contract between Fox and its distributors was a conspiracy in restraint of trade and an unlawful attempt to monopolize first-run pictures in violation of 15 U.S.C. §§ 1, 2, and 15 (1976). 359 U.S. at 502-03.

[26] Beacon made a timely demand for a trial by jury pursuant to Federal Rule of Civil Procedure 38(b). 359 U.S. at 503. That rule provides that "[a]ny party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties . . . [a written demand] ten days after the service of the last pleading." FED. R. CIV. P. 38(b).

[27] 359 U.S. at 506. *See* Redish, *supra* note 10, at 492-93 (at common law the chancellor could enjoin the legal action or stay the equitable action and exercise his discretion in ordering a jury trial of the issues).

[28] 359 U.S. at 508. The Court ruled that Beacon must be given "a full jury trial of every antitrust issue" before the court determines the appropriateness of the injunctive relief sought by Fox. *Id.*

[29] *Id.* at 506-07.

[30] Specifically, the Court stated that the availability of declaratory relief under the Declaratory Judgment Act and the liberal joinder provisions of the Federal Rules expanded legal remedies which affected the scope of equity jurisdiction. *Id.* at 509. *See* 5 MOORE'S FEDERAL PRACTICE ¶ 38.11[8.-2], at 128.7 (2d ed. 1979).

[31] Justice Black, writing for the majority, stated that inadequacy of remedy is a practical term which must be defined "not by precedents decided under discarded procedures, but in the light of the [development of modern legal remedies]." 359 U.S. at 507.

[32] The decision in *Beacon Theatres* has been labeled by one commentator as a "rational decision-making approach" to interpreting the seventh amendment. It has been described as an attempt "to accomplish the original broad purposes of the amendment by taking into account how changed circumstances and conditions affect the accomplishment of those purposes." Redish, *supra* note 10, at 487.

claim would be traditionally categorized as legal[33] or (2) if adequate modern legal remedies have developed that convert a historically equitable claim to an action at law.[34]

Three years after *Beacon Theatres* the Court employed and reinforced the principle that the adequacy of the legal remedies available in an action is of paramount importance in determining the right to a trial by jury.[35] In *Dairy Queen, Inc. v. Wood,*[36] the petitioner, owner of a trademark, brought suit alleging breach of a licensing contract for the right to use the trademark.[37] The petitioner sought temporary and permanent injunctions against further use of the trademark and an accounting to determine the exact amount owed under the licensing contract.[38] Petitioner's timely demand for a trial by jury[39] was denied by the lower courts.[40] The Supreme Court, in an opinion by Justice Black, reversed, holding that the legal issues raised by the peti-

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[33] The first prong of the test adopted in *Beacon Theatres* utilizes the strict historical approach to interpretation of the seventh amendment. *See* notes 15 through 18 and accompanying text *supra.*

[34] The second prong of the *Beacon Theatres* test recognizes that equity will abandon jurisdiction of a claim when there is an adequate remedy at law. *See* Kane, *Civil Jury Trial: The Case for Reasoned Iconoclasm,* 28 HASTINGS L.J. 1, 8 (1978); McCoid, *supra* note 23, at 12-13; Shapiro & Coquillette, *supra* note 17, at 447.

[35] Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478-79 (1962). Several commentators have viewed the holding in *Dairy Queen* as consistent with the approach adopted by the Court in *Beacon Theatres. See* Kane, *supra* note 34, at 9 (*Dairy Queen* reinforced and extended the principles of *Beacon Theatres*); Note, *The Right to a Jury Trial, supra* note 14, at 901 (the dynamic approach of *Beacon Theatres* to the seventh amendment was utilized in *Dairy Queen*); Comment, *Unfit for Jury Determination, supra* note 14, at 515-16 (in *Dairy Queen* the Court relied on *Beacon Theatres* as it continued to depart from the strict historical test). *But see* Redish, *supra* note 10, at 496-99 (the Court made little use in *Dairy Queen* of the "rational decision-making approach" to the seventh amendment developed in *Beacon Theatres* although the case was suitable for application of that approach).

[36] 369 U.S. 469 (1962).

[37] *Id.* at 473-74.

[38] *Id.* at 475.

[39] *See* FED. R. CIV. P. 38(b).

[40] Petitioner's demand for a jury trial, although struck by the district court, was upheld by the Third Circuit. The district court ruled that the plaintiff's case was "purely equitable" with only an "incidental claim for damages" and that defendant's answer raised only equitable issues in concluding that "neither party has the right to a jury trial of any of the issues . . . ." McCullough v. Dairy Queen, Inc., 194 F. Supp. 686, 687-88 (E.D. Pa. 1961), *aff'd mem.,* 290 F.2d 871 (3d Cir. 1961), *rev'd sub nom.* Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962).

tioner must be tried before a jury.[41]

Rejecting the "clean-up" doctrine, an equitable principle that allowed a court of equity to resolve legal issues,[42] the Court reasoned that the constitutional right to a trial by jury cannot be defeated merely because the legal issues historically would be incidental to the equitable claims.[43] The Court also rejected the argument that the characterization of an action as one traditionally based in equity could deprive a party of a trial by jury.[44] Recognizing that equity traditionally assumed jurisdiction over complex accounting actions,[45] the Court determined that the requisite degree of complexity was not present in the instant action.[46]

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[41] 369 U.S. at 479.

[42] The equitable "clean-up" doctrine allowed a court of equity to decide the legal issues in an equitable case once the court obtained jurisdiction over the case. Levin, *Equitable Clean-Up and the Jury: A Suggested Orientation,* 100 U. PA. L. REV. 320, 320 (1951). *See* 1 J. POMEROY, EQUITY JURISPRUDENCE § 181, at 231-42 (5th ed. Symons, 1941); 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 33, at 30 n.1 (14th ed. Boston 1918) (1st ed. Boston 1836); Note, *Constitutional Law—Federal Rules—Right to Civil Jury Trial,* 15 ALA. L. REV. 562, 565-66 (1963).

[43] 369 U.S. at 470. The Court relied upon Scott v. Neely, 140 U.S. 106 (1891), Rule 38(a) of the Federal Rules of Civil Procedure, and *Beacon Theatres* in holding that legal issues must be tried by a jury. 369 U.S. at 470-73. The Court cited *Scott* for the proposition that a court of equity cannot take jurisdiction of a suit in which legal and equitable claims are pled. *Id.* at 471. Rule 38(a) was relied upon by the Court to demonstrate that the Federal Rules do not infringe upon a party's inviolate right to a trial by jury. *Id.* at 472. *See* FED. R. CIV. P. 38(a). Similarly, the Court reiterated its holding in *Beacon Theatres* that only under "imperative circumstances . . . can the right to a jury trial of legal issues be lost through the prior determination of equitable claims." 369 U.S. at 472-73.

[44] The Court held that the petitioner's phraseology in requesting relief in the form of an accounting, a traditionally equitable remedy, rather than in the form of an action for debt or damages, traditionally legal remedies, did not control the character of the action. Stating that a suit in equity can be maintained only in the absence of an adequate legal remedy, the Court refuted the proposition that the seventh amendment right to a jury trial could be dependent upon "the choice of words used in pleadings." 369 U.S. at 477-78.

[45] *Id.* at 478. Quoting language in Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887), the Court stated that equity has traditionally maintained jurisdiction over an action for an accounting when the " 'accounts between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." 369 U.S. at 478.

[46] 369 U.S. at 478-79. The Court appeared to recognize, however, that a "rare case" might exist where the appointment of a special master under Rule 53(b) of the Federal Rules of Civil Procedure would enable a jury to decide adequately a complex accounting

II. Consideration of the Practical Abilities and Limitations of Juries: *Ross v. Bernhard* and Its Aftermath

A. Ross v. Bernhard *and the Demise of the Strict Historical Test*

The last in a trilogy[47] of cases signalling the demise of the strict historical approach to the determination of the seventh amendment right to a trial by jury was *Ross v. Bernhard.*[48] In *Ross,* the Supreme Court faced the question of whether a stockholder was entitled to a jury trial in a derivative suit brought on behalf of the corporation.[49] After determining that at least one aspect of the derivative suit involved a legal claim,[50] the Court

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case. *Id.* at 478. Although this language may provide an exception to the seventh amendment for cases involving complex accounting, it could also be utilized to allow a judge to try other complex cases without a jury by assuming equitable jurisdiction over the action. *See* Note, *The Right to a Jury Trial, supra* note 14, at 903 n.31, 906; notes 84 through 89 and accompanying text *infra.*

[47] The first two cases of the trilogy are *Beacon Theatres* and *Dairy Queen. See* notes 23 through 46 and accompanying text *supra.*

[48] 396 U.S. 531 (1970).

[49] Petitioners brought a derivative suit on behalf of the Lehman Corporation against its officers and brokers for violating federal law by extracting excessive brokerage fees from the corporation. *Id.* at 531-32. The Court of Appeals for the Second Circuit held that a derivative suit was equitable in nature and reversed the lower court's granting of the petitioners' demand for a trial by jury. Ross v. Bernhard, 403 F.2d 909, 912-14 (2d Cir. 1968), *rev'd,* 396 U.S. 531 (1970). *Contra,* DePinto v. Provident Security Life Ins. Co., 323 F.2d 826, 837 (9th Cir. 1963) (stockholder's derivative action alleging breach of fiduciary duty and negligence is a suit at common law which must be tried by a jury), *cert. denied,* 376 U.S. 950 (1964). For an analysis of the *DePinto* decision, see Note, *The Right to a Jury Trial in a Stockholder's Derivative Action,* 74 Yale L.J. 725 (1965).

[50] The Court emphasized that the dual nature of a derivative suit inheres in the equitable and legal claims presented. The stockholder's right to bring suit on behalf of the corporation has been based historically in equity; the underlying corporate claim against directors or third parties has, however, often contained legal issues for which a trial by jury could be demanded. 396 U.S. at 538. The dual nature of the derivative suit is evidenced by a shareholder's bringing the legal claims of a corporation in a court of equity. *See id.* Justice Stewart, in his dissenting opinion, rejected this analysis by concluding that the shareholder historically brought a derivative suit to enforce his own equitable right of action against an unfaithful fiduciary. *Id.* at 545 (Stewart, J., dissenting). *See* Prunty, *The Shareholder's Derivative Suit: Notes on its Derivation,* 32 N.Y.U.L. Rev. 980, 980-85 (1957). Although the rights of the shareholder were later enlarged to permit his bringing of a derivative suit against third parties, "the postulated 'corporate cause of action' has never been thought to describe an actual historical class of suit which was recognized by courts of law." 396 U.S. at 545-46 (Stewart, J., dissenting)

held that trial by jury must be provided for those claims that would have presented legal issues had the corporation sued on its own behalf.[51] The Court disregarded the strict historical approach[52] and recognized that the combination of law and equity under the Federal Rules of Civil Procedure[53] had made the traditional justification for preventing a court of law from entertaining a derivative suit obsolete.[54]

In footnote ten of the opinion in *Ross* the Court appeared to define the standard for determining when the seventh amend-

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(quoting Note, *supra* note 49, at 730). One commentator has described the majority's attempt to divide a derivative suit into equitable and legal components as "a complete judicial fiction" that blatantly ignores "the lines of judicial precedent existing in 1791." Note, *Jury Trial in a Stockholder's Derivative Suit*, 65 NW. U.L. REV. 697, 700-01 (1970).

[51] 396 U.S. at 542. The dissent criticized the conclusion of the majority by asserting that the plaintiff's claims were not based upon traditionally legal issues but rather upon a single equitable cause of action. *Id.* at 549 (Stewart, J., dissenting). The dissent dismissed any characterization of issues as inherently legal or equitable. It reasoned that "[t]here are only factual issues, and 'like chameleons, [they] take their color from surrounding circumstances.' " *Id.* at 550 (quoting James, *supra* note 19, at 692).

[52] Justice White, speaking for the majority, conceded that the common law did not recognize actions by stockholders against directors or third parties. Equity provided a remedy for such claims in the form of a derivative suit. 396 U.S. at 534. In light of this concession the dissent criticized the holding that a plaintiff in a shareholder's derivative suit has a constitutional right to a jury trial as tossing "aside history, logic, and over 100 years of firm precedent." *Id.* at 544-45 (Stewart, J., dissenting). Justice Stewart could not find a sound basis in policy or in the Constitution to support the decision of the Court and concluded that the holding could best be explained "as a reflection of an unarticulated but apparently overpowering bias in favor of jury trials in civil actions." *Id.* at 545, 551.

[53] *See* note 20 *supra*.

[54] The Court relied upon *Beacon Theatres* in reaffirming the proposition that the Federal Rules of Civil Procedure have expanded the legal remedies available in the federal courts and necessarily have diminished the scope of equity. 396 U.S. at 540. Noting the impact of the rules upon a derivative suit, the Court in *Ross* stated that traditionally a court of equity tried the legal claims of a corporation presented by a shareholder through a derivative suit because of the threat of irreparable injury to the plaintiff and the lack of an adequate remedy at law. *Id.* at 531. Because law and equity are procedurally combined today in the federal court:

> [t]he historical rule preventing a court of law from entertaining a shareholder's suit on behalf of the corporation is obsolete; it is no longer tenable for a district court, administering both law and equity in the same action, to deny legal remedies to a corporation, merely because the corporation's spokesmen are its shareholders rather than its directors.

Id. at 539.

ment right to a jury trial attached.[55] Recognizing that *Beacon Theatres* and *Dairy Queen* required that legal issues be tried to a jury,[56] the Court stated that a substantive count[57] of an action can be determined to be legal or equitable on the basis of three factors: "first, the pre-merger custom with reference to such questions; second, the remedy sought; and third, the practical abilities and limitations of juries."[58]

B. *The Effect of the Tripartite* Ross *Test upon Seventh Amendment Analysis*

The first two segments of the *Ross* test have been viewed generally as a reaffirmation of the historical test as modified by *Beacon Theatres* and *Dairy Queen*.[59] The third segment of the test, however, has been the subject of considerable controversy. Any consideration of "the practical abilities and limitations of juries" necessarily involves a functional inquiry into the right to a jury trial which has been traditionally the antithesis of seventh amendment analysis.[60] The viability of this functional inquiry was diminished considerably by the Court's refusal to apply the third factor of the tripartite test in its opinion and relegation of the test to an obscure footnote.[61]

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[55] *See id.* at 538 n.10.

[56] *Id.* at 537-38.

[57] *Ross* has been interpreted as providing a test for determining the applicability of the constitutional right to a trial by jury in which the " 'nature of the issue' presented is the determinative factor." Note, *supra* note 50, at 706-07. The Court stated that "[t]he Seventh Amendment question depends on the nature of the issue to be tried rather than the character of the overall action." 396 U.S. at 538.

Prior to *Ross* the nature-of-the-issue test had been suggested by Professor Moore and adopted by several courts. James, *supra* note 19, at 691 (citing 5 MOORE'S FEDERAL PRACTICE § 38.16 (2d ed. 1951)). The test has, however, been criticized for its susceptibility to various interpretations and the subjectivity required in its application. James, *supra* note 19, at 691-92.

[58] 396 U.S. at 538 n.10.

[59] Wolfram, *supra* note 17, at 643-44; Note, *The Right to a Jury Trial*, *supra* note 14, at 903.

[60] *See* Redish, *supra* note 10, at 524; Wolfram, *supra* note 17, at 644-45. Professor James has stated that the line dividing equity from law—the focal point of analysis of the right to a jury trial—was not "the product of a rational choice between issues which were better suited to court or to jury trial" but rather was the result of other factors. James, *supra* note 19, at 661.

[61] Redish, *supra* note 10, at 526. After concluding that the Supreme Court never

Immediate reaction by commentators to the functional inquiry suggested by *Ross* was unfavorable.[62] More recent speculation by legal writers as to the validity of the third part of the *Ross* test has varied from acceptance of the criterion as a basis for carving out an exception to the seventh amendment for complex cases[63] to a dismissal of the language as an aberration.[64]

The judiciary was similarly divided by the Court's failure to provide direction as to the import and application of a consideration of the jury's abilities and limitations. The tripartite test promulgated in *Ross* has been utilized by three district courts to

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intended the footnote in *Ross* to constitute a test of seventh amendment questions, Judge Becker of the Eastern District of Pennsylvania reasoned that:

> [i]t would be at least unusual for the Supreme Court to announce a new rule of constitutional magnitude in dicta, in a footnote, and unsupported by any explanation or citation of authority. The use of such means to modify *sub silentio* a rule of constitutional interpretation that has been consistently followed for decades, if not centuries, would be even more unusual . . . . Even the famous dictum in United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) did not go nearly as far as some have suggested for the *Ross* footnote.

Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 888, 926-27 (E.D. Pa. 1979) (footnotes omitted).

[62] Within one year of the *Ross* decision, commentators had begun to voice criticism of the functional analysis required by the tripartite test and to theorize that the third criterion of the test lacked constitutional significance. *See The Supreme Court, 1969 Term*, 84 HARV. L. REV. 32, 176 n.26 (1970); Note, *Ross v. Bernhard: The Uncertain Future of the Seventh Amendment*, 81 YALE L.J. 112, 130 (1971). *But see* Note, *Derivative Actions and the Seventh Amendment*, 27 WASH. & LEE L. REV. 344, 351 (1970) (the third element of the *Ross* test allows a court to assess jury competency in the rare case anticipated by *Dairy Queen* where the legal issues are too complex to be handled by the jury alone).

[63] *See, e.g.*, Kane, *supra* note 34, at 11 (the Court's adoption of the issue test in *Ross* reflects the possibility of adopting a functional jury trial test which will necessarily inject policy considerations into seventh amendment analysis); Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 793-95, 800 (the *Ross* footnote must be viewed in light of *Dairy Queen* which suggests that an investigation of jury competency is warranted in rare cases); Note, *The Right to a Jury Trial*, *supra* note 14, at 911 (*Ross* requires courts to determine whether legal issues can be adequately decided by a jury, given the practical abilities and limitations of jurors).

[64] *See, e.g.*, C. WRIGHT, *supra* note 20, § 92, at 454 (the balancing test invited by the *Ross* footnote should not be interpreted as displacing the traditional test for determination of the right to a trial by jury); Redish, *supra* note 10, at 526 (it is difficult to accept the *Ross* footnote as a rejection of established precedent and historical practice); Wolfram, *supra* note 17, at 645 (footnote 10 in *Ross* does not justify a determination that the historical test under *Beacon Theatres* and *Dairy Queen* has been superseded by a functional approach to seventh amendment questions).

strike a timely demand for a jury trial on legal issues that would traditionally have been tried before a jury.[65] Other courts have interpreted the *Ross* criterion as proposing a balancing test of constitutional dimensions, but have not found the facts of cases before them sufficient to warrant overriding the constitutional guarantee of a jury trial.[66] The Court of Appeals for the Ninth Circuit[67] and the United States District Court for the Eastern District of Pennsylvania[68] have joined other lower courts in the view that the *Ross* test cannot be interpreted as denying to a party his seventh amendment right to a trial by jury.[69] Other courts have implicitly rejected the tripartite *Ross* test by refusing either to recognize or discuss the *Ross* footnote as affecting the seventh amendment.[70]

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[65] ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978) (the magnitude and complexity of an antitrust action alleging monopolization of the computer industry was held to be beyond the competency of any jury); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (the size of the antitrust suit and the complex relationships between the parties to the action rendered it beyond the ability of a jury to make a rational decision); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 103-05 (W.D. Wash. 1976) (the complexity of the accounting issues in a securities fraud action was determined to exceed the jury's ability to decide the facts rationally).

[66] *See, e.g.*, United States v. Anderson, 584 F.2d 369, 373 (10th Cir. 1978) (taxpayer was deemed to have the right to a trial by jury in an action for collection of taxes where the factual issue of liability was appropriate for jury resolution); Farmers-Peoples Bank v. United States, 477 F.2d 752, 757 (8th Cir. 1975) (question of bank's knowledge of employer's ability and intent to pay payroll taxes held "peculiarly appropriate for jury resolution"); Chappell & Co. v. Pumpernickel Pub, Inc., 79 F.R.D. 528, 530-31 (D. Conn. 1977) (jury determined to be capable of deciding copyright infringement suit and awarding damages); Prudential Oil Corp. v. Phillips Petroleum Co., 392 F. Supp. 1018, 1023 (S.D.N.Y. 1975) (contract dispute held properly triable to a jury due to its ability to determine the issues in that suit); Van Earmen v. Schmidt, 374 F. Supp. 1070, 1076 (W.D. Wis. 1974) (damage claim brought under Civil Rights Act held appropriate for resolution by jury).

[67] *In re* United States Financial Sec. Litigation, 609 F.2d 411, 425, 431 (9th Cir. 1979) (the court refused to apply the third factor delineated in the footnote in *Ross* as a rule of constitutional dimensions so as to create a complexity exception to the seventh amendment).

[68] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 927 (E.D. Pa. 1979) (the *Ross* dictum held not to authorize a departure from the historical test).

[69] *See, e.g.*, Barber v. Kimbrell's, Inc., 577 F.2d 216, 225 n.25 (4th Cir. 1978) (the failure of the Court to reiterate the third part of the *Ross* footnote raises doubt as to its validity), *cert. denied*, 439 U.S. 934 (1978).

[70] *See, e.g.*, Securities & Exch. Comm'n v. Commonwealth Chem. Sec., Inc., 574 F.2d 90, 95 (2d Cir. 1978) (emphasis upon historical test); Tights, Inc. v. Stanley, 441 F.2d

III. The Debate Concerning a Complexity Exception to Seventh Amendment Analysis

A. The Argument Supporting the Exception

At common law, courts of equity tried their cases without juries.[71] A nonjury trial was especially appropriate to particular actions founded in equity. Complex accounting cases were not thought to be amenable to trial by jury because most jurors could not read or write and, not being able to understand the accounts, could not render a rational verdict.[72]

The Court's analysis of the seventh amendment right to a trial by jury in *Beacon Theatres* and *Dairy Queen* focused upon the adequacy of the legal remedy.[73] These decisions were based on the principle that if the remedy for an action at law were inadequate, equity would assume jurisdiction over the suit.[74] *Dairy Queen* indicates that equity may assume jurisdiction over an action today if the procedural devices available under the Federal Rules of Civil Procedure fail to unravel the complex issues before the court.[75] Today, complex civil litigation presents

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336, 340-41 (4th Cir. 1971) (the existence of complex and difficult issues of liability alone does not justify invocation of equity jurisdiction), *cert. denied,* 404 U.S. 852 (1971). *See also* Note, *The Right to a Jury Trial, supra* note 14, at 911 n.70 (some courts have applied the third part of the *Ross* test "almost as an afterthought").

[71] 1 J. Story, *supra* note 42, § 31, at 27.

[72] In England, chancellors enjoined actions at law which would have required jurors to comprehend complex accounting issues. *See* Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603) (judge heard action for possession of real property which involved written evidence including accounts not suitable to resolution by "a jury of ploughmen"). *See generally* Wedderburn v. Pickering, 13 Ch. D. 769, 769, 771-72 (1879) (boundary dispute held not to be "conveniently tried before a jury").

[73] Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962) (in order to maintain an equitable action there must be no adequate remedy at law); Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1959) (equity has jurisdiction only when the remedy at law is inadequate).

[74] Perhaps the most general if not the most precise description of a Court of Equity, in the English and American sense, is that it has jurisdiction in cases of rights, recognized and protected by the municipal jurisprudence, where a plain, adequate, and complete remedy cannot be had in the Courts of Common Law.

1 J. Story, *supra* note 42, § 33, at 29.

[75] 369 U.S. at 478. Specific reference was made to consideration of the usefulness of appointing a special master pursuant to rule 53(b) of the Federal Rules of Civil Procedure. *Id.* At least one court has concluded that the appropriateness of a special master

the federal judiciary with the rare cases[76] and exigent circumstances[77] anticipated by *Dairy Queen* and *Beacon Theatres*, and compels the conclusion that such litigation must be tried without a jury.

1. Limitations on the Exception

Although a complexity exception to the seventh amendment can be justified theoretically, defining the limits of the exception is a formidable task. As a point of reference, it is important to recall that the language of the Court in *Dairy Queen* demonstrates that complex issues of accounting may serve as the basis for assumption of equitable jurisdiction by a court.[78]

The first district court to apply the tripartite *Ross* test in a complex case was presented with a factual situation similar to the one posed hypothetically in *Dairy Queen*. *In re Boise Cascade Securities Litigation* included a securities fraud action in which the defendants moved to strike the plaintiff's jury demand because of complex accounting questions.[79] Striking the demand, Judge Sharp noted the complex accounting problems presented by the suit and recognized that a court must hear a case without a jury when the complexity of the case exceeds the jury's rational ability to decide the facts.[80]

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must be considered and rejected before the demand for a jury trial may be denied. Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978).

[76] *Dairy Queen* recognized that only in "rare" cases can equity assume jurisdiction over legal issues. 369 U.S. at 478.

[77] The Court in *Beacon Theatres* stated that the right to a trial by jury can be lost due to prior determination of the claims in equity only "under the most imperative circumstances." 359 U.S. at 511.

[78] In *Dairy Queen* the Court stated that an action at law could be tried in equity if "the 'accounts . . . between the parties' are of such a 'complicated nature' that only a court of equity can satisfactorily unravel them." 369 U.S. at 478. This language is based upon Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887), in which the Court held that the difficulty to a jury of unraveling complicated accounts between the parties provides a sufficient ground for a court of equity to take cognizance of the case. *See also* Fowle v. Lawrason, 30 U.S. (5 Pet.) 495, 503 (1831) (Court of Chancery can exercise jurisdiction over cases involving great complexity in the accounts between the parties even if the action was not an equitable action of account).

[79] 420 F. Supp. 99 (W.D. Wash. 1976). The court noted that competing theories of accounting presented complex questions which had to be resolved by the trier of fact in order to determine accurately the financial condition of the corporation. *Id.* at 103.

[80] *Id.* at 103-04. Judge Sharp also based his decision upon the time required for a

In *Bernstein v. Universal Pictures, Inc.*, the court struck the plaintiff's demand for a jury trial in a complex antitrust suit involving complicated accounting problems.[81] The court interpreted the third part of the *Ross* test as a restatement of the traditional equitable power of a court to assume jurisdiction over complex cases.[82] Striking the demand for a jury trial, the court concluded that the case was so complex that it exceeded the ability and competency of any jury to make a rational decision.[83]

A court's assumption of equitable jurisdiction over otherwise legal issues should not be confined only to suits for an equitable accounting. As illustrated by *Dairy Queen*, the concept of inadequacy of legal remedies is fundamental to all remedies and not just to suits to require an equitable accounting.[84] Additionally, the thrust of *Beacon Theatres*, *Dairy Queen*, and *Ross* has been the avoidance of the use of static categories in determining the application of the seventh amendment.[85]

At least one district court has expanded the concept of assumption of equitable jurisdiction over complex issues beyond the narrow confines of accounting. In *ILC Peripherals Leasing Corp. v. International Business Machines Corp.*,[86] Judge Conti made the decision to strike the jury demand on retrial of the action after a mistrial had been declared in the first instance.[87] Reasoning that the inadequacy of the remedy at law was the basis for a court's assumption of equitable jurisdiction,[88] the court concluded that the legal remedy in the instant case was inade-

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jury to hear the case and the impact of protracted litigation on the selection of competent jurors. *Id.*

[81] 79 F.R.D. 59, 61 (S.D.N.Y. 1978).

[82] *Id.* at 67.

[83] *Id.* at 70. The court emphasized the complexity of the case resulting from the size of the litigation, the relationship among the parties, and the accounting questions involved. *Id.* To the extent that the decision in *Bernstein* is based upon the complexity in the accounts of the parties, it is consistent with the strict interpretation of *Dairy Queen* and *Boise Cascade*.

[84] 369 U.S. at 478.

[85] Note, *The Right to a Jury Trial, supra* note 14, at 906.

[86] 458 F. Supp. 423 (N.D. Cal. 1978).

[87] The court declared a mistrial after five months of trial when the jury announced it was deadlocked. *Id.* at 426.

[88] *Id.* at 445.

quate because the issues were beyond the competency of a jury.[89]

2. Application of the Exception

The three questions of the *Ross* test provide a useful means of determining the legal or equitable nature of the issues raised in a suit.[90] First, would the issues of the case have been tried at common law before the merger of law and equity?[91] Second, have modern legal remedies been developed that allow the case to be tried at law today?[92] If the first two questions are answered in the negative, the substantive count is equitable and the inquiry ends. However, if the issue is legal in nature, a third question must be considered: is comprehension of the issue beyond "the practical abilities and limitations of juries?"[93] If that

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[89] *Id.* at 447-48.

[90] Two methods have been suggested for applying the *Ross* tripartite test to complex cases—a whole case approach and an issue approach. The "whole case" analysis of the *Ross* test has been rejected by most courts and commentators. That analysis would determine if a case is beyond the ability of a jury on the basis of the complexity of the case taken as a whole. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 933-34. This view is clearly contrary to the position adopted by *Ross* that the seventh amendment right to a trial by jury is determined by the legal or equitable nature of the issues to be tried. *See* Dairy Queen, Inc. v. Wood, 396 U.S. at 538.

The issue approach follows the dictates of *Ross* by determining complexity in light of each substantive count in the action. Any issue which is within the ability of a jury to comprehend would first be tried at law. The remaining complex issues would then be tried without a jury. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 934 (a nonjury trial may be utilized only for those issues which are too complex for the jury). To the extent that *Bernstein* embraces the whole case approach and rejects the issue approach, it should be disregarded. *See* Bernstein v. Universal Pictures, Inc., 79 F.R.D. at 70 ("complexity of the relationships among the parties renders it *as a whole* beyond the ability and competence of any jury to decide with rationality") (emphasis in original).

[91] The *Ross* inquiry originates with a restatement of the strict historical test, a logical point of origin for constitutional analysis. *See* notes 16 through 18 and accompanying text *supra*.

[92] The second question in the *Ross* analysis is based upon the Court's recognition in *Beacon Theatres* that expanding legal remedies have affected the scope of equity jurisdiction. *See* notes 30 through 34 and accompanying text *supra*.

[93] One commentator has suggested that a consideration of juries' abilities and limitations involves a determination of whether the jury can perform its function of adjudicating the issue in question. Note, *The Right to a Jury Trial, supra* note 14, at 911. The jury's function is twofold: "[f]irst, the jury must be able to receive the evidence presented . . . [and] [s]econd, given the facts of the case, the jury must [be able to]

question is answered in the affirmative, the court must conclude that the legal remedy is inadequate, assume equitable jurisdiction over the issue, and decide the issue without a jury.

The courts that have accepted the third part of the *Ross* test[94] have not applied it consistently. However, this should not be viewed as an indication that the elements of this test cannot be stated concisely and applied uniformly. In determining whether a jury would be incapable of rationally deciding an issue, a court must consider several factors.[95] These include the conceptual sophistication of the issue,[96] the number of facts that must be retained by a jury,[97] and the efficacy with which procedural devices and trial techniques bring the issue within the competence of the jury.[98]

'select from among conflicting inferences and conclusions that which it considers most reasonable.' " *Id.* at 907 (quoting Tennant v. Peoria & Pekin Union Ry., 321 U.S. 29, 35 (1944)).

[94] *See* notes 65 and 66 and accompanying text *supra.*

[95] [T]he point at which a jury's limitations exceed its abilities is not precise nor is it easy of definition. No single factor alone can dictate that a jury should not hear a case . . . . [A] number of factors must combine to convince the Court that a jury would be incapable of fairly deciding a case.

In re Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976).

[96] Today's complex civil litigation will often require the resolution of issues that are based upon complicated scientific or technical facts. A court must determine whether the conceptual sophistication of each issue exceeds the ability of a jury to make a rational decision. For example, in *Bernstein* the court determined that special accounting problems rendered the case unfit for determination by a jury. 79 F.R.D. at 70. Other courts have indicated issues outside the realm of accounting are not especially suited for resolution by a lay jury. *See, e.g.*, Tights, Inc. v. Stanley, 441 F.2d 336, 342 (4th Cir. 1971) ("abstract scientific theories, . . . intricate mechanical devices, and . . . complex chemical compounds"); Securities & Exch. Comm'n v. Associated Minerals, Inc., 75 F.R.D. 724, 725 (E.D. Mich. 1977) (fraud and noncompliance with securities laws); Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119, 124 ("validity, infringement, and accounting in patent cases").

[97] In considering the number of facts required to be retained by a jury, the court should inquire into the number and depth of exhibits to be introduced at the trial and the number of witnesses to be called to testify. The number of facts, however, can be considered only in terms of their adverse effect upon the ability of the jury to decide each issue in the suit and not their effect upon the competency of the jury to decide the entire case.

[98] This factor has been construed to involve consideration of the usefulness of appointing a special master. *See* note 75 *supra.* For a discussion of procedural devices and trial techniques which might be utilized by a court to simplify a complex case see notes 216 through 230 and accompanying text *infra.*

For example, the court in *ILC Peripherals*[99] attempted to determine the complexity of each issue in the case by applying the factors mentioned above. First, the court recognized that the accounting and engineering concepts that had to be understood by the trier of fact in order to resolve the issue of whether an antitrust violation had occurred were beyond the ordinary jury's experience and comprehension.[100] Second, the court considered the number of facts rationally related to a just disposition of each issue. It determined, for instance, which of the eighty-seven witnesses and 2,300 exhibits pertained to the antitrust issue.[101] Finally, the court examined the question whether the complex issues could be simplified by any procedural innovations or trial techniques.[102] On the basis of these considerations the court decided that the inability of the jury to comprehend the issues rendered the legal remedy of a trial by jury inadequate.

B. The Argument Against the Exception

Any inquiry into the creation of an exception to the seventh amendment must begin with an analysis of the role of the jury in the United States. The right to trial by jury in civil cases at common law is a cornerstone in our system of federal jurisprudence.[103] Any curtailment of this right must be scrutinized carefully.[104]

The "accounting cases" in which equity assumed jurisdic-

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[99] 458 F. Supp. 423 (N.D. Cal. 1978).

[100] *Id.* at 446.

[101] *See id.* at 444.

[102] Although this determination is somewhat speculative, in *ILC Peripherals* the court based its decision to take the case from the jury on record of the initial action and the observations at trial. *Id.* at 447-48. Judge Conti reasoned that "a second trial by jury could very easily suffer the same fate as the first" and concluded that "where the case is as technically and financially complex as this one is, this right [to a trial by jury] should be limited to one jury trial." *Id.* at 448.

[103] Jacob v. City of New York, 315 U.S. 752, 752 (1941) ("The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence."). *See* Simler v. Connor, 372 U.S. 221, 222 (1963) ("[F]ederal policy favoring jury trials is of historic and continuing strength.").

[104] In Dimick v. Schiedt, 293 U.S. 474, 486 (1935), the Supreme Court stated that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

tion over an action properly cognizable at law reflect the existence of concurrent jurisdiction of law and equity in such actions.[105] When concurrent jurisdiction was present, the plaintiff was allowed to choose the forum and the first court to assume jurisdiction over the controversy ordinarily did not relinquish it.[106] If the plaintiff chose to bring the suit as an action at law, neither the defendant nor the court could transfer the case to equity, even though the claims might have been more conveniently tried in a court of equity.[107] Therefore, the accounting cases stand only for the proposition that a plaintiff has the option to pursue a jury or nonjury trial.[108] Even if these cases can

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[105] 5 MOORE'S FEDERAL PRACTICE ¶ 38.25, at 199 (2d ed. 1979). *See* Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887) (complicated nature of the accounts is a sufficient basis for equity jurisdiction); Fowle v. Lawrason, 30 U.S. (5 Pet.) 495, 503 (1831) (equity may not take cognizance of every action of account). For an analysis of matters within the concurrent jurisdiction of law and equity see 1 J. POMEROY, *supra* note 42, §§ 139-40, at 191-94.

[106] Pomeroy explained that a court of equity will not entertain a suit over the same subject matter as in a suit which has already been commenced in a court of law. This rule is subject to exceptions which include:

> the existence of some distinctively equitable feature of the controversy which cannot be determined by a court of law, or some fraudulent or otherwise irregular incidents of the legal proceeding sufficient to warrant their being enjoined, or the necessity of a discovery, either of which grounds would render the legal remedy inadequate.

1 J. POMEROY, *supra* note 42, § 179, at 251-52.

[107] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 909 (citing 2 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 581, at 2 (14th ed. Boston 1918) (1st ed. Boston 1836) (footnotes omitted) (a court of equity has no authority to assume jurisdiction over a case on the basis of convenience of investigating the dispute unless the parties voluntarily agree to do so) and Williams v. Herring, 183 Iowa 127, 165 N.W. 342, 344 (1917) (assumption of equitable jurisdiction does not turn upon whether a court or a jury can more conveniently or satisfactorily try to determine a cause)).

[108] 478 F. Supp. at 909. Judge Becker, in rejecting the theory that the accounting cases recognize a means by which equity can assume jurisdiction over complex actions, stated:

> There is nothing in any of these [accounting] cases to indicate that the plaintiff could not have chosen to proceed at law, with a jury. In this respect, they are no different from many other kinds of actions presenting issues which, before the merger of law and equity, would be tried to a jury or to the court depending on the manner in which the plaintiff chose to proceed.

Id. at 909-10.

There are two basic situations in which issues arise allowing the plaintiff to choose the mode of trial without leaving room for judicial discretion. The first involves *B*'s violation of *A*'s statutory right which would enable *A* to seek relief in equity, i.e., injunction,

be interpreted as providing an avenue for a court of equity to assume jurisdiction over a legal issue involving complex accounting, it is doubtful that any historical justification for this procedure survived the merger of law and equity.[109]

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or in law, i.e., damages or penalties. *A*'s choice of forum would bind the parties in the second action according to the prior determination of the common issues. The second situation involves *B*'s breach of certain kinds of contracts with *A* which would entitle *A* to elect to sue in equity for specific performance or at law for damages. F. JAMES, JR. & G. HAZARD, JR., *supra* note 13, § 8.7, at 370-72.

Justice Black's majority opinion in *Dairy Queen* specifically addressed the first situation discussed by Professors James and Hazard. Relying on *Beacon Theatres* as precedent, he stated:

> where both legal and equitable issues are presented in a single case, "only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims."

369 U.S. at 472-73 (quoting Beacon Theatres, Inc. v. Westover, 359 U.S. at 510-11).

[109] It is crucial to recognize that the language in *Dairy Queen* suggesting that a defendant may not have the authority to demand a trial by jury in a complex accounting case is dicta. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 913. It is also significant that the case from which the language concerning equity's jurisdiction over complex accounts was taken was decided 50 years before the merger of law and equity. *See* Kirby v. Lake Shore & Mich. S. R.R., 120 U.S. 130, 134 (1887) (complicated accounts constituted a basis for equitable jurisdiction). Furthermore, equity was held to have jurisdiction in *Kirby* due to methods of investigation peculiar to the courts of equity and the allegation of fraud, an issue traditionally resolved in equity. *See id.* The statement by the Court that "[i]t would have been difficult, if not impossible, for a jury to unravel the numerous transactions involved" was merely an articulation of Story's bias towards equitable jurisdiction of actions for accounting. *See id.* (citing 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 451 (Boston 1836)). *See also* 2 J. STORY, *supra* note 107, § 591, at 9 ("[t]he whole machinery of Courts of Equity is better adapted to the purpose of an account").

Any advantage which a court of equity may have at one time enjoyed over a court of law concerning methods of investigation of actions was taken away with the merger of law and equity in the federal system. A significant innovation in civil procedure occurred with the inclusion of broad and flexible provisions for discovery in the federal rules. C. WRIGHT, *supra* note 20, § 81, at 398. *See* FED. R. CIV. P. 26-37. The use of a special master, once peculiar to equity, now may be utilized in actions based at law. *See id.* at rule 53(c). Another basis for equity's jurisdiction over complex accounts which no longer exists today was the rule at law which prohibited parties from testifying on their own behalf. F. JAMES, JR. & G. HAZARD, JR., *supra* note 13, at 622; Comment, *The Right to an Incompetent Jury, supra* note 14, at 525-26 (footnotes omitted).

These developments at law have diminished the scope of equity. *See* Beacon Theatres, Inc. v. Westover, 359 U.S. at 504. Just as the historical justification for preventing a derivative suit from being brought at law is no longer viable today, the reason for preventing accounting actions from being brought at law no longer exists. *See* Ross v.

In addition, there is no constitutional basis for creating an exception to the right to trial by jury in complex cases. Any interpretation of the *Ross* footnote[110] as imposing a functional inquiry into seventh amendment questions is without merit.[111] The Court itself refused to apply the footnote in *Ross*,[112] and it has ignored the footnote when considering seventh amendment questions since *Ross*.[113] Indeed, complexity has never been considered by the Court as a basis for the assumption of equitable jurisdiction over legal issues.[114] Even in the complex accounting

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Bernhard, 396 U.S. at 540. Therefore, excluding the opinion of Justice Story that equity is better suited to actions on accounts, *Kirby* no longer represents a justification for the assumption of equitable jurisdiction over an action cognizable at law.

[110] 396 U.S. at 538 n.10.

[111] *See* notes 61 through 64 and accompanying text *supra*.

[112] *See* note 61 and accompanying text *supra*.

[113] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 335 (1979) (expanded use of collateral estoppel held not violative of seventh amendment); Lorillard v. Pons, 434 U.S. 575, 580-82 (1978) (right to jury trial exists in age discrimination suit); Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 460-61 (1977) (administrative agency adjudications of OSHA violations upheld); Pernell v. Southall Realty, 416 U.S. 363, 376, 381 (1974) (jury trial is available upon demand for suit to recover possession of real property under District of Columbia Code provision); Curtis v. Loether, 415 U.S. 189, 191-92 (1974) (either party may demand a trial by jury for suits involving alleged violations of the Fair Housing Act); Colgrove v. Battin, 413 U.S. 149, 159-60 (1973) (local rule allowing six-man juries in civil cases held not violative of the seventh amendment).

It is particularly significant that the *Ross* footnote was not applied in *Curtis*. The lower court applied the footnote as a tripartite test and concluded that the civil rights issues raised by the suit were not complex and the jurors' abilities and limitations did not present an obstacle to their resolution of the issues. Rogers v. Loether, 467 F.2d 1110, 1118 (7th Cir. 1972), *aff'd sub nom.* Curtis v. Loether, 415 U.S. 189 (1974).

The failure of the Court to recognize the *Ross* footnote as a test of constitutional significance is best illustrated by the Court's refusal to apply the footnote in the *Ross* case itself. Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 927. *See* note 61 and accompanying text *supra*. The district court denied the defendant's motion to strike the plaintiff's demand for a jury trial by ruling that the issues were legal and were "not so complicated as to make it impracticable for a jury to ascertain" the damages. Ross v. Bernhard, 275 F. Supp. 569, 570 (S.D.N.Y. 1967), *rev'd on other grounds*, 403 F.2d 909 (2d Cir. 1968), *rev'd on other grounds*, 396 U.S. 531 (1970). The court of appeals expressed doubt that juries are competent to try derivative actions because of the complex nature of such cases but flatly stated that "the Seventh Amendment does not ask that we assess the suitability of a given type of litigation for jury trial." 403 F.2d 909, 915 (2d Cir. 1968), *rev'd on other grounds*, 396 U.S. 531 (1970).

[114] Complexity appears to have been irrelevant to a determination of the adequacy of a remedy at common law. With the limited exception of an action for an accounting, there is no historical support for the contention that a court of equity had the power to

cases, jurisdiction was based upon the procedural differences between law and equity, differences that were abolished by the Federal Rules of Civil Procedure.[115] The Court has consistently held that massive compilation of facts and difficulty of proof do not provide a basis for assumption of equitable jurisdiction.[116]

1. Cases Rejecting the Exception

Although several courts have questioned the validity of the *Ross* footnote,[117] only two courts have held decisively that there is no complexity exception to the seventh amendment. In *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*,[118] the plaintiffs alleged that Japanese defendants and others had conspired to take over the American electronic products industry in violation of antitrust laws.[119] The defendants moved to strike the

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determine without a jury an otherwise complex action at law. Comment, *Unfit for Jury Determination, supra* note 14, at 530. Judge Becker in his scholarly opinion in *Zenith Radio* concluded his analysis of the treatment of complex cases at common law as follows:

> [A]s a matter of actual historical practice, matters cognizable at law were tried to juries in the courts of common law, regardless of complexity. Though there was an exception to this general rule, that exception was limited to matters of "account," and further limited by the plaintiff's ability to choose a jury or non-jury trial in such matters.

478 F. Supp. at 918.

[115] *See* note 107 *supra.*

[116] The Supreme Court has specifically addressed this proposition on at least two occasions. In Curriden v. Middleton, 232 U.S. 633 (1914), the Court was faced with a situation in which an attorney was alleged to have fraudulently obtained a patent for a client. Although the Court stated that the facts involved might be complicated, "mere compilation of facts alone and difficulty of proof are not a basis of equity jurisdiction." *Id.* at 636 (citing United States v. Bitter Root Dev. Co., 200 U.S. 451, 476 (1906)). In *Bitter Root,* an action for wrongful cutting and conversion of timber, the Court stated that even though the defendant may have organized different corporations to make it more difficult for the complainant to meet his burden of proof, this did not provide a basis for the assumption of jurisdiction by equity. 200 U.S. at 472. *See* Bowen v. Chase, 94 U.S. 812, 824 (1876) ("[i]f the evidence is merely voluminous or tedious, that circumstance is not sufficient cause for removing a case from a court of law to a court of equity"). *Contra,* Goffe & Clarkener, Inc. v. Lyons Milling Co., 26 F.2d 801, 804 (D. Kan. 1928) ("while mere difficulty of proof is not sufficient to confer jurisdiction upon equity," complex accounting actions that the jury cannot handle may be brought in equity).

[117] *See* note 69 and accompanying text *supra.*

[118] 478 F. Supp. 889 (E.D. Pa. 1979).

[119] *Id.* at 892-94. The antitrust laws which allegedly were violated by the Japanese defendants included provisions of the 1916 Antidumping Act, 15 U.S.C. § 72 (1976) (sys-

plaintiffs' demand for a trial by jury because of the nature of the alleged conspiracy, the sophistication of the laws allegedly violated, the numerous procedural problems presented by the trial, and the anticipated length of the trial.[120] Since the legislative history of the antitrust laws is not conclusive of congressional intent regarding the right to a trial by jury, the court determined that constitutional standards must apply.[121] Concluding that complexity afforded a basis for assumption of jurisdiction by a court of equity only in complex accounting cases, the court noted that the "historical ability to bring complex accounting matters to a court of equity . . . may not have survived the merger of law and equity."[122] Reasoning that the *Ross* dictum was inconsistent with the Supreme Court's analysis of seventh amendment questions, the court held that complexity is not a constitutionally permissible justification for infringing upon the right to trial by jury.[123]

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tematically selling products in this country for substantially less than their actual value abroad) and the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) (price discrimination among American purchasers). Other defendants were charged with violating § 7 of the Clayton Act, 15 U.S.C. § 18 (1976) (improper foreign "acquisitions of interests in domestic consumer electronic products manufacturers"). 478 F. Supp. at 894.

[120] 478 F. Supp. at 897. The defendants filed a summary of their contentions in support of their motion to strike the plaintiffs' demand for a jury trial. Included in that summary were statements reflecting that the alleged conspiracy was worldwide, lasting over 30 years and involving over 97 businesses. The defendants also alleged that application of the sophisticated antitrust laws involved required an understanding of accounting, marketing, economics, and law. Application of the law was further complicated by the lack of precedent in prior case law. Also included in the summary were statements intended to inform the court of the procedural problems inherent in the case, primarily centering upon testimony of Japanese witnesses and the introduction of Japanese business records. Additionally, the defendants indicated that the anticipated length of trial was one year. *Id.* at 897-98.

[121] The court recognized that the right to a jury trial may be expressly provided by federal statute or the legislative history of the act may clearly indicate congressional intent that jury trials be available. *Id.* at 901-02. *Compare* The Propeller Genesee Chief v. Fitzhugh, 53 U.S. (12 How.) 443, 459-60 (1851) (Great Lakes Act specifically provides for trial by jury) *with* Lorillard v. Pons, 434 U.S. 575, 583-85 (1978) (legislative history reflects congressional intent to have jury trial for age discrimination suits). After scrutinizing the legislative history of the antitrust laws and not discovering any positive evidence that Congress intended to guarantee a trial by jury in antitrust actions, the court turned to constitutional standards. 478 F. Supp. at 904.

[122] 478 F. Supp. at 942. *See* note 107 and accompanying text *supra.*

[123] The court found that, despite the *Ross* dictum recommending a consideration of the practical abilities and limitations of juries, the Supreme Court continues to employ

The most recent case to reject a complexity exception to trial by jury in civil cases was *In re United States Financial Securities Litigation.*[124] The district court had held that the litigation arising out of the bankruptcy of a large real estate corporation was so complex as to fall within the court's equity powers and that it could be heard without a jury.[125] The Court of Appeals for the Ninth Circuit reversed, holding that there is no complexity exception to the right to a trial by jury.[126] The court indicated that although equity historically could obtain jurisdiction over complex suits for an accounting, the instant action was based upon issues cognizable at law and could not be translated into a suit for an accounting simply because accounting principles were involved in the case.[127] The court refused to interpret

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the historical test. 478 F. Supp. at 929. In attempting to explain the functional approach suggested by *Ross* the court determined that the third factor in the footnote is subject to two interpretations which do not constitute a test for seventh amendment questions. First, the language might be a reference to the traditional availability of equity jurisdiction in cases involving complex accounts. *Id.* Second, the dictum might refer to functional considerations as to the compatibility of trial by jury in statutory actions committed by Congress to special adjudicatory forums. *Id.* at 929-30. *See, e.g.*, Atlas Roofing Co. v. Occupational Safety & Health Review Comm'n, 430 U.S. 442, 445, 461 (1977) (administrative enforcement of health and safety regulations upheld); Katchen v. Landry, 382 U.S. 323, 339 (1966) (nonjury proceeding in bankruptcy is more desirable than trial by jury); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 48-49 (1937) (administrative enforcement of labor legislation was constitutional). In rejecting the functional test proposed by the *Ross* footnote, the court concluded that complexity was "not a constitutionally permissible reason for striking the plaintiffs' jury demands." 478 F. Supp. at 942.

[124] 609 F.2d 411 (9th Cir. 1979).

[125] 75 F.R.D. 702, 714 (S.D. Cal. 1977), *rev'd*, 609 F.2d 411 (9th Cir. 1979). Judge Turrentine reasoned that inadequacy of the remedy at law was the basis for granting equity jurisdiction over complex cases. 75 F.R.D. at 710. He determined that a jury was "unqualified to study, untangle, and make comprehensible" the accounts of the 100 party defendants which would be demonstrated by the introduction of 24,000 documents totaling 100,000 pages of evidence and the testimony of 250 witnesses for the plaintiffs alone. *Id.* at 707, 708, 713. He concluded that a trial by jury constituted an inadequate remedy at law in the instant case because of the complex accounting problems involved, the inability of a jury to understand the issues in the case, and the two years estimated to try the suit. *Id.* at 711.

[126] 609 F.2d at 432.

[127] Judge Anderson stated that the appellees' analogy between the instant case and actions for an equitable accounting where the jury could not decide complex issues "misses the mark." *Id.* at 423.

> A suit for an "accounting" was a narrow and little-used ground for establishing equitable jurisdiction. The present actions do not involve any claims for an equitable accounting. The questions in this case are of a legal character tradi-

the *Ross* footnote as mandating a functional inquiry into the levels of jury competency, reasoning that the Supreme Court never intended the footnote to be read as a test of constitutional significance,[128] and that such a test would be too speculative to have any practical application.[129]

2. Problems with the Exception

The Supreme Court's failure to provide constitutional guidelines for conducting a functional inquiry into the competency of juries promotes haphazard speculation as to the ability of the "typical jury" to unravel the complexity of a particular issue. A case-by-case approach would open the door to an examination of jury competency in all cases[130] and would not be susceptible to consistent application by the courts.[131] The practical effect of an ambiguous constitutional standard that is applied inconsistently would be the disruption of efficient administration of justice. Such a standard would require constant clarification by the Court, thus destroying any remnant of a pure test.[132]

Traditional seventh amendment analysis has been generic in

> tionally heard at common law. The fact that a case may involve accounting principles cannot magically convert the legal causes of action into an action for an equitable accounting.

Id. at 424.

[128] The circuit court rejected the district court's interpretation of the *Ross* footnote as establishing a test of constitutional significance based upon consideration of four factors: first, the improbability that the Court would depart from the historical test in a footnote; second, the failure of the sources cited by the Court for the footnote to support a functional approach to seventh amendment questions; third, the refusal of the Court to follow the *Ross* footnote in subsequent decisions; and fourth, the inconsistency between the *Ross* dictum and prior seventh amendment analysis. *Id.* at 424-26.

[129] *Id.* at 431-32.

[130] An ad hoc approach to a complexity exception for seventh amendment analysis would make jury competence an open question in every case. Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D. Ill. 1977).

[131] One commentator has stated that an obvious problem with a case-by-case analysis of complexity and jury competency is the "total lack of predictability" of such an approach and the conflicts in the circuits that may well result from its attempted application. Redish, *supra* note 10, at 516-17. Any principled and consistent application of the *Ross* footnote would be unachievable on an ad hoc basis in light of the subtle lines drawn in previous decisions. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 932 (footnotes omitted).

[132] *See* Redish, *supra* note 10, at 517.

nature, focusing upon whether the issues within a suit are customarily tried to a jury; therefore, the Supreme Court's resolution of the jury trial question for one case has applied to all cases of the same class.[133] At least one court has ruled that the *Ross* footnote should also be applied on a generic basis, thus allowing a court to characterize a class of cases as either legal or equitable.[134] Although a generic approach may eliminate much of the unpredictability of a case-by-case analysis, it would curtail the right to a trial by jury in all cases within a designated class irrespective of the simplicity of the issue in an individual case.[135]

Under either approach, the trial court judge would have the power to divest a litigant's right to trial by jury, thus encouraging judicial repeal of the seventh amendment.[136] Furthermore, motions to strike a demand for a jury trial could be used by unscrupulous attorneys as a dilatory tactic that would add ultimately to the congestion in the federal courts.[137]

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[133] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 931. For example, the Court held in Pernell v. Southall Realty, 416 U.S. 363 (1974), that actions for the recovery of real property in courts of general jurisdiction are not limited to the narrow facts set out in the applicable statute of the District of Columbia Code, but may include all claims in the same general class. *See also* Curtis v. Loether, 415 U.S. 189 (1974) (all actions for damages under the Fair Housing Act are triable to a jury); Ross v. Bernhard, 396 U.S. 531 (1970) (derivative suits by stockholders to enforce corporate claims which are legal in nature are subject to trial by jury).

[134] The inquiry is a generic one, directed toward classifying a group of claims. Thus, the historical portion of the *Ross* test evaluates the entire line of judicial precedents to determine the traditional characterization of a particular claim. Once the court finds that the nature of the issue is basically legal, the right to a jury trial exists for that entire class of claims.

Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227 (N.D. Ill. 1977).

[135] *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 931 n.69 (issues within a given class may vary greatly in the degree of complexity); Comment, *Unfit for Jury Determination, supra* note 14, at 532 (if the claims in a particular class were determined beyond the abilities of a jury, there would be no right to a trial by jury for any action in the class, "no matter how uncomplicated the facts of the individual case").

[136] Redish, *supra* note 10, at 517.

[137] Judge Becker, in *Zenith Radio,* concluded that:

recognition of the possible validity of motions to strike jury demands on the grounds of complexity would impose yet one more burden on courts managing "big" cases. There would doubtless be motions to dispense with juries in most or all of these cases, and the motion could serve as a dilatory tactic, with po-

C. *The Demise of the Complexity Exception and the Need for a Permanent Solution to Jury Incompetency in Complex Civil Litigation*

Even though an announcement of the demise of a complexity exception to the seventh amendment would be premature, the decisions in *Zenith Radio* and *Financial Securities* indicate that the judicial pendulum is swinging away from adoption of a complexity exception. Admittedly, there is an analogy between a jury of illiterate ploughmen trying to decide a case involving written accounts[138] and juries of ordinary laymen attempting to comprehend modern technology in patent cases[139] or to resolve complex antitrust allegations.[140] Yet there is no indication that complexity per se ever has been a basis for assumption of equitable jurisdiction in suits cognizable at law.[141] Indeed, the procedural advantages in equity, advantages that no longer exist in the modern federal system, were more than likely responsible for

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tential interlocutory appeals adding to the delay.
478 F. Supp. at 933.

[138] Clench v. Tomley, 21 Eng. Rep. 13 (Ch. 1603). *See* note 72 and accompanying text *supra*. *But see* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. at 915-18. *Clench* may be explained on grounds other than that complex cases were not heard by a jury. It may be that equity assumed jurisdiction over an action because jurors lacked personal knowledge of the case, a requirement for actions at law at that time, or that equity was better equipped to compel discovery and entertain arguments as to the applicability of the doctrine of laches. *Id.* at 917-19 (footnotes omitted). "Finally, it is possible that a complete reading of *Clench* would have to take account of the temptations to excess at a time when the famous struggle between law and equity was approaching its climax." *Id.* at 918 n.45. In any event, *Clench* was decided in 1603, 188 years before the adoption of the seventh amendment. Because the historical test focuses upon the division between law and equity in 1791, a decision as early as 1603 is of limited precedential value. *Id.* at 918.

[139] *See* Railex Corp. v. Joseph Guss & Sons, Inc., 40 F.R.D. 119, 124 (D.D.C. 1966) ("complex issues of validity, infringement, and accounting in patent cases do not often lend themselves today to proper determination by a lay jury"); Ropski, *supra* note 14, at 631-32.

[140] *See* Harris & Liberman, *supra* note 14, at 620. Jurors themselves have expressed doubt as to whether laymen can grasp the difficult concepts presented in complex antitrust actions. Judge Conti questioned the foreman of the *ILC Peripherals* jury as to his impression of whether juries were qualified to hear complex antitrust actions. The foreman replied that a qualified juror in such a case needed to be "both a computer technician, a lawyer, [and] an economist." ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423, 447 (N.D. Cal. 1978).

[141] *See* notes 114 through 116 and accompanying text *supra*.

assumption of equitable jurisdiction in complex cases.[142]

Although *Zenith Radio* and *Financial Securities* herald a rejection of the complexity exception, they will not end attempts to circumvent the dictates of the seventh amendment. As complex cases become more frequent, the inadequacies of the jury system are magnified.[143] Some courts and scholars have proposed a due process solution to the problem of requiring jurors to decide cases that exceed their abilities.[144] Other authorities have been reluctant to restrict seventh amendment rights and have insisted that use by courts of innovative trial techniques and procedures will bring complex issues within the competency of the jury.[145]

IV. The Search for a Viable Due Process Exception to the Seventh Amendment for Complex Civil Litigation

A. The Argument Supporting the Exception

Our system of American jurisprudence is designed to reach the truth of the matter in controversy. The sine qua non of this search for the truth is a fair trial.[146] At a minimum, a fair trial requires that the finder of fact be able to comprehend the issues of a case and render a rational verdict based upon a reasoned understanding of those issues.[147] To require a litigant in a com-

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[142] *See* note 107 *supra*.

[143] *See, e.g.*, Kirkham, *supra* note 14, at 208.

[144] *See* notes 148, 149, 159 through 161 and accompanying text *infra*.

[145] *See* notes 216, 221 and accompanying text *infra*.

[146] Estes v. Texas, 381 U.S. 532, 540 (1965) (televising of criminal trial held to be violative of due process).

[147] Harris & Liberman, *supra* note 14, at 620. In support of this proposition, the authors rely upon definitions of due process in the context of the relationship between due process and the right to a trial by jury in criminal cases. The authors acknowledge that "the Due Process Clause protects a defendant from jurors who are actually incapable of rendering an impartial verdict, based on the evidence and the law." *Id.* at 621 n.46 (citing Peters v. Kiff, 407 U.S. 493, 501 (1972) (systematic exclusion of blacks from grand juries constitutes a denial of due process)). They further emphasized an excerpt from a criminal case in which a form letter from a jury commission requesting suggestions for jury service was attacked on due process grounds.

> For a person to be deprived of his or her life, liberty or property by jurors who did not adequately understand and comprehend the evidence would obviously be to deprive such person of his or her constitutional right to due process, the

plex civil action to pursue his case before a jury that cannot grasp the concepts upon which the case turns offends the traditional notions of due process expressed in the fifth amendment.[148] Such a requirement would constitute a mockery of justice.[149]

Implicit in the protection furnished by the due process clause of the fifth amendment is the right to be treated fairly according to the principles of liberty and justice which are fundamental to our democratic institutions.[150] This concept of fundamental fairness is embodied in the due process clause[151] and requires that litigants be provided a "fair trial in a fair tribu-

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very process our jury system is intended to insure.

Harris & Liberman, *supra* note 14, at 621 n.46 (citing United States v. Hunt, 265 F. Supp. 178, 187 (W.D. Tex. 1967) (English language qualification is of vital importance to ensure due process in complex criminal and civil cases), *aff'd*, 400 F.2d 306 (5th Cir. 1968), *cert. denied*, 393 U.S. 1021 (1969)). The authors also recognize that in order to comply with the requirements of due process, "a tribunal [must be] both impartial and mentally competent to afford a hearing." Harris & Liberman, *supra* note 14, at 621 n.46 (citing Jordan v. Massachusetts, 225 U.S. 167, 176 (1912) (state court's refusal to set aside criminal conviction on due process grounds after sanity of juror was established by a preponderance of the evidence upheld)). Although the cases cited arise in a criminal context, the mandate that due process requires jurors to comprehend the facts and law included in a case would surely apply in civil cases with equal force.

[148] Note, *The Right to a Jury Trial*, *supra* note 14, at 910. The fifth amendment's due process clause provides that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. amend. V.

[149] Kirkham, *supra* note 14, at 208 ("To afford merely the opportunity to present evidence and argument in a forum unable to comprehend them is simply a mockery of justice.").

[150] *See, e.g.*, Hannah v. Larche, 363 U.S. 420, 422 (1960) (fifth amendment right to due process embodies rules of fair play); Galvin v. Press, 347 U.S. 522, 530 (1954) (the sense of fair play is the essence of the due process clause of the fifth amendment).

[151] Commentators have pointed out that:

> The essential guarantee of the due process clause is that of fairness. The procedure must be fundamentally fair to the individual in the resolution of the factual and legal basis [sic] for government actions which deprive him of life, liberty or property. While different situations may entail different types of procedures, there is always the general requirement that the government process be fair and impartial.

J. NOWAK, R. ROTUNDA, & N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW 501 (1978). *See* Kinsella v. United States, 361 U.S. 234, 246 (1960) (the denial of fundamental fairness violates due process); Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring) (violations of fundamental fairness offend the notions of due process).

nal."[152] If the issues presented in a complex civil case are beyond the ability of jurors to comprehend or to render a rational decision, due process requires that the traditional mode of trial by jury be replaced by a forum in which fairness can be achieved.[153] If a jury cannot understand a complex case, its verdict will be the product of an arbitrary decision. Since arbitrary decisions violate the litigants' constitutional rights,[154] due process compels the adoption of procedures that will minimize the risk of an erroneous jury decision.[155] Because due process is flexible and can

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[152] *E.g.*, Withrow v. Larkin, 421 U.S. 35, 46 (1975) (procedures of medical examining board did not violate due process); Groppi v. Wisconsin, 400 U.S. 505, 511 (1971) (defendant on trial for committing a misdemeanor has the right to attempt to establish a change of venue); *In re* Murchison, 349 U.S. 133, 136-37 (1955) (judge acting as a one-man grand jury violates due process).

[153] "If . . . a traditional mode of trial makes it impossible for a case to be comprehended and the law understandingly applied, due process requires that mode be replaced." Kirkham, *supra* note 14, at 208. *See* Harris & Liberman, *supra* note 14, at 622 (a jury trial is not an essential component of the guarantees of the due process clause). *See, e.g.*, United States v. Reynolds, 397 U.S. 14, 18-19 (1970) (jury in eminent domain proceeding is discretionary with the court); Shillitani v. United States, 384 U.S. 364, 365 (1966) (jury trial is not required in a civil contempt proceeding); Katchen v. Landry, 382 U.S. 323, 336-37 (1966) (bankruptcy proceeding is not subject to trial by jury); Fong Yue Ting v. United States, 149 U.S. 698, 730 (1893) (deportation proceeding before a judge does not violate due process); Church v. Kelsey, 121 U.S. 282, 283 (1887) (state grant of jurisdiction to courts of equity over cases requiring equitable relief is not violative of due process); *Ex parte* Wall, 107 U.S. 265, 289-90 (1882) (summary expulsion of attorney from bar does not require jury trial).

[154] The concept of due process was derived from English law where it was "designed to secure the subject against the arbitrary action of the crown and place him under the protection of the law." Dent v. West Virginia, 129 U.S. 114, 123 (1889) (state licensing requirement for physicians held not to violate due process). Similarly, the due process clause of the fifth amendment was interpreted as early as 1819 as having been "intended to secure the individual from the arbitrary exercise of the powers of government." Bank of Columbia v. Okely, 17 U.S. (4 Wheat.) 235, 244 (1819) (incorporation of bank by statute granting the bank a summary remedy for outstanding notes does not violate due process). In more recent times, the Supreme Court has viewed the protection of the citizen from arbitrary action by the government as "the touchstone of due process." Wolff v. McDonnell, 418 U.S. 539, 558 (1974) (procedure for determining loss of prisoner's good time credits must satisfy due process standards). *See* Ohio Bell Tel. Co. v. Public Utils. Comm'n, 301 U.S. 292, 302 (1937) (due process is concerned with protecting the individual against arbitrary governmental action).

[155] A well reasoned due process analysis must consider the likelihood that an erroneous decision will be reached in any given case under the existing procedural framework: "[P]rocedural due process rules are shaped by the risk of error inherent in the truth-finding process as applied to the generality of cases, not the rare exceptions." Mathews v. Eldridge, 424 U.S. 319, 344 (1976) (procedure by which right to social security disability

be applied to any number of factual situations,[156] a court may fashion a due process remedy by providing a nonjury proceeding in complex civil cases that exceed the limitations of jury competency.[157]

The three district courts that have recognized a complexity exception to the seventh amendment for civil litigation have couched their decisions in language which, at a minimum, has overtones of a due process analysis. In so doing, these courts appear to have recognized the validity of a due process exception to the right of trial by jury in complex civil litigation.[158] The

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benefits is established did not deny due process of law). *See, e.g.*, Califano v. Yamaski, 99 S.Ct. 2545, 2555 (1979) (due process does not require an oral hearing prior to recoupment of social security overpayments because written submission can substantially reduce the risk of error); Parham v. J.R., 99 S.Ct. 2493, 2506 (1979) (unchecked parental discretion in institutionalization of children for mental health care has a high risk of error); Addington v. Texas, 99 S.Ct. 1804, 1808 (1979) (to reduce the risk of an erroneous decision the standard of proof in an involuntary commitment proceeding must be between a preponderance of the evidence and a reasonable doubt).

Consideration of the risk of an erroneous decision within a given procedural structure may not have originated in *Eldridge*. Although there is no indication in *Eldridge* of the basis for this consideration, a similar analysis was applied in the context of the allocation of the burden of proof in Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (denial of free speech by state act restricting veterans' tax exemptions to persons taking loyalty oaths violates due process). The Court in that case recognized that a margin of error always exists in litigation with respect to the finding of fact and that this margin is reduced by placing the burden of proof upon the party not having "at stake an interest of transcending value." *Id.* at 525.

[156] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (fifth amendment's due process clause is flexible according to the demands of the particular situation); FCC v. WJR, The Goodwill Station, Inc., 337 U.S. 265, 275 (1949) (due process clause of the fifth amendment is variable and not fixed).

Justice Frankfurter best illustrated the flexible nature of due process in his concurring opinion in Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951):

> "[D]ue process" . . . is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, "due process" cannot be imprisoned within the treacherous limits of any formula . . . . Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process.

Id. at 162-63 (Frankfurter, J., concurring) (attorney general's designation of communist groups violated due process).

[157] Comment, *The Right to an Incompetent Jury, supra* note 14, at 798-99.

[158] One commentator has suggested that every approach to the problem presented

court in *ILC Peripherals* embraced this recognition when it reasoned that requiring a jury to render a verdict in a case that it does not understand would defeat the purpose of the jury in protecting litigants from arbitrary decisions.[159] Similarly, the *Boise Cascade* court relied upon the procedural safeguards of the fifth amendment when it held that a jury trial will be allowed only if the jury is qualified and capable of making a rational finding of facts.[160] The court in *Bernstein* also relied upon principles of due process, as evidenced by its conclusion that when a jury cannot comprehend an issue in a case, the court must strike a motion for a trial by jury because the parties have a right to a rational verdict.[161]

1. Applying the *Eldridge* Criteria to the Complex Case

The due process limitations imposed by the Constitution are designed to limit the government's exercise of potentially destructive power over the individual.[162] When governmental action deprives an individual of life, liberty, or property, that individual must be afforded procedures that protect his interests.[163]

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by the complex civil case in which a party seeks to avoid the requirement of trial by jury imposed by the seventh amendment is "at least implicitly related to the concept of due process." *Id.* at 798.

[159] 458 F. Supp. at 448-49. *See* note 154 *supra.*

[160] 420 F. Supp. at 103-05. Although Judge Sharp did not refer specifically to the due process clause in his opinion, there is little room for doubt that his opinion relied heavily upon its guarantee of fundamental fairness.

> Central to the fairness which must attend the resolution of a civil action is an impartial and capable fact finder . . . . [A]t some point, it must be recognized that the complexity of a case may exceed the ability of a jury to decide the facts in an informed and capable manner. When that occurs, the question arises as to whether the right and necessity of fairness is defeated by relegating fact finding to a body not qualified to determine the facts.

Id. at 104.

[161] 79 F.R.D. at 71 (the court's failure to strike a demand for a trial by jury would allow a party "at its choice the right to an irrational verdict").

[162] Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and Criticism*, 66 YALE L.J. 319, 340 (1957).

[163] J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 151, at 478. The Supreme Court's elaboration of the interests which warrant protection under the due process clause and the procedures necessary to protect those interests "has been an evolving process punctuated by vague generalizations and declarations of broad, overarching principles." L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 10-8, at 506 (1978).

By interpreting the limitations imposed upon action by the government as a means of ensuring a fair and orderly method of resolving disputes,[164] the Supreme Court has adopted an instru-

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In the early part of this century the Court indicated that the line defining the interests to be protected by due process guarantees would be drawn along a right-privilege distinction. Due process required that governmental denials of the rights of individuals be checked by adequate procedural safeguards while denials of privileges by the government did not warrant the invocation of constitutional safeguards. J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 151, at 478.

The right-privilege distinction was significantly undermined by the concept of unconstitutional conditions and the recognition of individuals' entitlement to government benefits. *See id.* at 478-79 (discussion of concept of unconstitutional conditions); L. TRIBE, *supra*, §§ 10-8, 10-9, at 510-22 (same). *See also* Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968) (discussion of the principles that have eroded the right-privilege distinction). The doctrine of unconstitutional conditions prohibits states from doing indirectly what they are forbidden to do directly. Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321, 325 (1935) (the doctrine of unconstitutional conditions is principally concerned with the circumstances under which a government "may use one power that is normally valid in order to induce a person to forego the exercise of what is admittedly a 'constitutional right' "). *See, e.g.*, Speiser v. Randall, 357 U.S. 513, 526 (1958) (government may not act indirectly so as to achieve that which it could not do directly).

The Court's protection of individuals' interest in governmental benefits has led to the expansion of the concept of property beyond its common law definition. This expansion was largely due to Professor Reich's recognition that entitlements to governmental programs constituted a "new property." J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 151, at 479. *See generally* Reich, *The New Property*, 73 YALE L.J. 733 (1964). For a recent criticism of Reich's concept of "new property" see Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445, 485, 490 (1977) ("the metaphor of the new property was not necessary to show the bankruptcy of the right-privilege distinction . . . and [now] threatens to leave us with the worst possible legacy—highly contingent and insecure dependencies on government and the doctrinal erosion of due process of law").

More recently, the Court has again begun to restrict the interests protected by due process, resurrecting to a significant degree the right-privilege distinction. J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 151, at 479-80. *See* L. TRIBE, *supra*, §§ 10-10, 10-11, at 522-32 (narrowing of protected interests). For example, in Paul v. Davis, 424 U.S. 693 (1976), the Court used the notion of entitlements to exclude reputation alone from the "core" interests protected by the Constitution. *Id.* at 701. The present Court is willing to recognize that although procedural due process protects a wide range of interests, it does not extend indefinitely. Board of Regents v. Roth, 408 U.S. 564, 570 (1971) (nonrenewal of a state teacher's contract does not warrant due process protection). For an analysis of the limits of due process protection of liberty and property rights see Monaghan, *Of "Liberty" and "Property,"* 62 CORNELL L. REV. 405 (1977).

[164] The enforcement of a system of rules that enables individuals to settle their disputes in a predictable and orderly fashion has been described as a fundamental characteristic of an organized society. Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (indigents seeking a divorce cannot be denied access to courts because of their inability to pay

mental approach to due process.[165] The instrumental approach emphasizes the need for accuracy in decision-making and is clearly evident in the Court's decisions regarding the necessity of evidentiary hearings prior to the termination of governmental benefits.[166] Although these cases have no factual correlation with complex civil litigation, the balancing test employed in them may be used as an analytic tool in considering whether a jury trial violates due process in situations where the jury is incapable of understanding the issues in a case.

In *Mathews v. Eldridge*,[167] the Court stated that the determination of what due process is in a given case requires the weighing of three distinct factors: first, the individual's interest; second, the risk of error inherent in the proceeding and the value of additional safeguards; and third, the government's interest and the additional fiscal and administrative burdens created by a substitute procedure.[168] Although the Court in *Eldridge* continued to balance the individual's interests against the government's interests in defining the applicability of the due process clause,[169] its emphasis on the likelihood of an erroneous decision was a significant addition to traditional due process analysis.[170]

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fees and costs).

[165] The instrumental approach to due process is based upon the premise that procedures must be designed to reduce the chance of mistaken deprivations of protected interests. L. TRIBE, *supra* note 163, § 10-7, at 503. *See, e.g.*, Fuentes v. Shevin, 407 U.S. 67, 97 (1972).

[166] *See, e.g.*, Mathews v. Eldridge, 424 U.S. 319, 343 (1976) (due process is not violated by termination of social security benefits prior to a formal hearing).

[167] 424 U.S. 319 (1976).

[168] *Id.* at 335. Professor Tribe articulately paraphrased the *Eldridge* test as "requiring a weighing of the personal interests infringed, discounted by the chance that alternative procedures would be more likely to safeguard it, against the added cost of such alternative procedures. . . ." L. TRIBE, *supra* note 163, § 10-13, at 540.

[169] Note, *Constitutional Law—Due Process—Termination of Social Security Disability Benefits—Prior Evidentiary Hearing Not Required*, 60 MARQ. L. REV. 128, 131-32 (1976). For an analysis of the balancing test utilized prior to *Eldridge* see Note, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975).

[170] Note, *Constitutional Law—Due Process of Law—Evidentiary Hearing Is Not Required Prior to Termination of Social Security Disability Benefits*, 45 U. CIN. L. REV. 672, 678 (1976). Since *Eldridge*, the inquiry into the risk of error inherent in the procedure under due process scrutiny has been routinely applied by the Court as a vital ele-

a. The Property Interests of the Individuals

Application of the *Eldridge* factors to complex civil litigation raises intriguing due process questions. The first factor, consideration of the individual's interest, indicates that an individual in civil litigation has significant property interests that merit due process protection. Damages or other relief sought by a party to litigation will unquestionably constitute a property interest within the meaning of the fifth amendment.[171]

b. The Risk of an Erroneous Decision and the Selection of a Representative Jury

As in the previous examination of the extent to which an issue is beyond the limitations and abilities of jurors, a determination of the risk of an erroneous decision resulting from a jury trial in a complex case involves a consideration of several factors. Three of these factors include those suggested in the argument for the complexity exception: the conceptual sophistication of the issue, the number of facts that must be retained by a jury, and the efficacy with which procedural devices and trial techniques bring the issue within the competence of the jury.[172]

Another important factor is the impanelment of jurors at random from a cross section of the community.[173] The selection of jurors who are representative of the community is both the

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ment of due process analysis. *See* note 155 *supra*.

The approach to due process analysis employed by the Court in *Eldridge*, however, has been criticized. Professor Mashaw has viewed the *Eldridge* approach as unsatisfactory because of the Court's "focus on questions of technique rather than on questions of value. That focus . . . generates an inquiry that is incomplete because unresponsive to the full range of concerns embodied in the due process clause." Mashaw, *The Supreme Court's Due Process Calculus for Administrative Adjudication in Mathews v. Eldridge: Three Factors in Search of a Theory of Value*, 44 U. CHI. L. REV. 28, 30 (1976).

[171] The real and personal property that is at stake in complex civil cases will certainly fall within the ambit of the due process clause. J. NOWAK, R. ROTUNDA, & N. YOUNG, *supra* note 151, at 491 ("all of the traditional forms of real and personal property fall within" the definition of property).

[172] *See* notes 95 through 98 and accompanying text *supra*.

[173] Tradition has established that when juries are used as instruments of public justice they must truly represent the community. Smith v. Texas, 311 U.S. 128, 130 (1940) (exclusion of blacks from grand juries violates fourteenth amendment due process).

declared policy of Congress[174] and a constitutional requirement.[175] Nevertheless, a representative jury is rarely impaneled in a complex civil case because of the extraordinary amount of time required to try such cases.[176] The failure of the courts to impanel a representative jury is in part due to the courts' habit of routinely excusing jurors for reasons of hardship or inconvenience.[177] For example, many individuals are either unable or unwilling to serve on a jury in a protracted civil suit because of employment[178] and personal obligations.[179] Recent congressional

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[174] 28 U.S.C. § 1861 (1976) ("It is the policy of the United States that all litigants in federal courts entitled to trial by jury shall have the right to . . . juries selected at random from a fair cross section of the community. . . .").

[175] Taylor v. Louisiana, 419 U.S. 522, 527 (1975) (exclusion of women from jury denies due process); Colgrove v. Battin, 413 U.S. 149, 160 n.16 (1973) (local rule providing for juries of six people in civil cases upheld).

[176] The five major decisions that have confronted the question of whether a jury is required in complex civil actions illustrate that such cases are unusually lengthy. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 895 (E.D. Pa. 1979) (length of trial estimated at one year); ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423, 444 (N.D. Cal. 1978) (original trial by jury lasted five months); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978) (trial estimated to last four months); *In re* United States Financial Sec. Litigation, 75 F.R.D. 702, 713-14 (S.D. Cal. 1977) (trial estimated to last two years), *rev'd on other grounds*, 609 F.2d 411, 416 (9th Cir. 1979); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976) (six months trial anticipated by counsel).

[177] 28 U.S.C. § 1866(c) (Supp. 1978) provides that no person shall be excluded or excused from jury service except for specified reasons, one of which is a showing to the court "of undue hardship or extreme inconvenience." In defining the limits of this exception Congress stated:

> "[U]ndue hardship or extreme inconvenience", as a basis for excuse from immediate jury service under section 1866(c)(1) of this chapter, shall mean great distance, either in miles or travel-time, from the place of holding court, grave illness in the family or any other emergency which outweighs in immediacy and urgency the obligation to serve as a juror when summoned, or any other factor which the court determines to constitute an undue hardship or to create an extreme inconvenience to the juror; and in addition, in situations where it is anticipated that a trial or grand jury proceeding may require more than thirty days of service, the court may consider, as a further basis for temporary excuse, severe economic hardship to an employer which would result from the absence of a key employee during the period of such service.

Id. at § 1869(j). The provision allowing a juror to be excused from service on the basis of the economic hardship to the juror's employer may be invoked frequently in complex cases. *See id.*

[178] It is difficult for many employed people to leave their jobs for extended periods to serve on juries. *See In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976) ("It would not be unreasonable to excuse prospective jurors from service in

efforts to reduce the economic hardship caused by jury service[180] have done little to make service on juries in lengthy trials more attractive.[181]

The exclusion of people most qualified to serve on juries increases the risk of an erroneous decision. In many jury trials the people who are perhaps best qualified to serve as jurors are excused from service.[182] Unfortunately, this situation occurs with greater frequency in complex civil cases. Prospective jurors who are well suited to serve on a jury because of their education, training, and experience are often excused from service,[183] either

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this civil case if they believe that service for that period of time would impair their employment."); McKelway, *Layman's View of Jury Service*, 5 F.R.D. 207, 208 (1946).

[179] Few persons, irrespective of their employment situation, are able to sacrifice their personal obligations to their families, friends, and civic and religious organizations to serve as jurors for extended periods of time. *See* Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 68-69 (S.D.N.Y. 1978) ("Ordinary people cannot devote a month or more of their lives to jury service.") (citing 1977 JUDICIAL CONFERENCE OF THE SECOND JUDICIAL CIRCUIT OF THE UNITED STATES, TRANSCRIPT OF PROCEEDINGS 29 (Sept. 9, 1977)); Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 777.

[180] The Jury System Improvements Act of 1978 increased the fee for jury service by 50% from $20 to $30 for each day of attending the trial. The Act also allows the judge to authorize at his discretion the payment of up to five additional dollars for every day beyond the first 30 days of trial. Furthermore, the Act increases the travel allowance for jurors from 10 cents per mile to the maximum rate prescribed for federal employees. H.R. REP. No. 95-1652, 95th Cong., 2d Sess. 12-13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 5477, 5485-86. These provisions of the Act are codified at 28 U.S.C. § 1871 (Supp. 1978).

[181] It is difficult to believe that a person would be more likely to accept jury service on the basis of a $10 per day increase in compensation. The rate of jury fees of $30 per day is only slightly more than the present minimum wage.

To individuals earning more than the fees paid to jurors, jury service in protracted litigation presents an economic hardship. *See* Broeder, *supra* note 10, at 390-91 ("Jury service often involves heavy economic sacrifices. . . ."); Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 776-77 (lengthy trials impose heavy financial burdens on the average working juror). Even if these people were protected by employer-compensation plans, the maximum time allowed by such plans is only two to four weeks, a relatively short time in a complex civil trial. *Id.* at 777.

[182] Broeder, *supra* note 10, at 390; Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 780.

[183] *See In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 104 (W.D. Wash. 1976) (prospective jurors in a securities fraud case with "exposure to a contemporary commercial or business environment" were frequently excused because of the undue hardship created by jury service upon their employment obligations); Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 780 (excusal for cause was more likely to occur with "members of the population with relevant skills").

by their own initiative or by peremptory challenges.[184] Frequently, the individuals remaining on the jury will neither reflect a fair cross section of the community nor be able to comprehend the complex issues in a case.[185] With a reduction in the number of those most qualified to render a reasoned decision is a commensurate increase in the risk of an erroneous decision.

c. The Probable Value of Alternative Procedural Safeguards

Due process requires that issues beyond the comprehension of a jury be litigated in a nonjury proceeding. Such a proceeding is necessary because a judge is more likely than a jury to decide complex cases in a rational manner.[186] Several factors militate in favor of disposition of these issues by the judge. First, most judges have experience as practicing attorneys that would be helpful in deciding a complex case.[187] Second, the judge may

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[184] Comment, *The Right to an Incompetent Jury*, *supra* note 14, at 780-82. "In sum, the challenge stage can strongly contribute to the selection of a jury which is not representative of the highly skilled and educated members of the community. Although the potential for this result is present in any litigation, its effect is especially pernicious in a complex case." *Id.* at 782.

[185] *See, e.g.*, ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978) (jury consisted of housewives, a retired person, and people employed where they could be replaced). In that case Judge Conti concluded that:

> [t]he 11 jurors to whom this case was submitted probably represented a random cross-section of people in the community who could afford to spend 10 months serving on a jury, but it is open to question whether they were a true cross-section of the community . . . . While the court was appreciative of the effort they put into deciding the case, it is understandable that people with such backgrounds [and limited technical education] would have trouble applying [the complex concepts involved in the case].

Id. In Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59, 70 (S.D.N.Y. 1978), when confronted with a situation similar to that in *ILC Peripherals*, the court stated:

> When persons entitled to be excused from such a lengthy case have been eliminated from the venire, must litigants be left with a panel consisting solely of retired people, the idle rich, those on welfare, and housewives whose children are grown? Hardly a "fair cross-section of the community wherein the court convenes."

Id.

[186] *See* Hyde Properties v. McCoy, 507 F.2d 301, 306 (6th Cir. 1974) ("a nonjury trial of the issues is . . . more likely to produce a just result"); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash. 1976) (a court is "more capable of fairly deciding the facts" than a jury); Note, *The Right to a Jury Trial*, *supra* note 14, at 917 (in complex civil cases judges are more competent at finding the facts than juries).

[187] Redish, *supra* note 10, at 506 n.82.

have been exposed to similar cases[188] while on the bench. Third, a judge may question counsel and witnesses to clarify any confusing areas of law or fact.[189] Fourth, a judge may weigh the facts and apply the law in a more leisurely and deliberate manner than a jury which has just finished hearing a lengthy case.[190] Finally, a judge is less likely to be susceptible to emotional appeals than is a jury.[191]

d. The Government's Interest

The government has an interest in protecting the rights of parties in complex civil litigation. It is responsible for ensuring that the trial is conducted fairly and that the ultimate decision is correct.[192] Additionally, the government is interested in conducting litigation in a manner that conforms with sound principles of judicial administration.

e. The Fiscal and Administrative Impact of a Nonjury Trial

The absence of juries in complex cases does not appear to entail any adverse impact on the course of civil litigation. In fact, bench trials have many fiscal and administrative advantages over jury trials. Empirical studies indicate that, on the average, a bench trial is forty per cent less time-consuming than a jury trial of the same case.[193] Such a reduction in time translates

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[188] *Id.*

[189] *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash. 1976) (in a nonjury proceeding the judge may systematically question witnesses); Harris & Liberman, *supra* note 14, at 623 (a judge may have witnesses clarify confusing aspects of their testimony); Redish, *supra* note 10, at 506 n.82 ("the judge is in a better position to address questions both to counsel and expert witnesses to obtain quicker and better clarification than a jury will receive"); Note, *The Right to a Jury Trial, supra* note 14, at 917 (a judge may request further argument from counsel or, pursuant to FED. R. EVID. 614 (a), (b), may call witnesses and question them).

[190] Harris & Liberman, *supra* note 14, at 623 ("when the trial is concluded, the trial judge can retreat into his chambers and take as much time as necessary to prepare a reasoned decision").

[191] *See* note 10 and accompanying text *supra.*

[192] To ensure the correctness of the ultimate decision the judge may render a judgment notwithstanding the verdict. *See* FED. R. CIV. P. 50.

[193] Kalven, *supra* note 2, at 1059. One timesaving feature of a nonjury trial is that a judge does not have to take time away from the trial to read all of the evidentiary documents to the jury. *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99, 105 (W.D. Wash.

into a decrease in administrative costs. The extra time spent when a court is forced to try a complex case to a jury is important because the court must remove itself from new case assignments and thereby increase the workload for the other courts in the district.[194]

Administratively, a nonjury trial is superior to a trial by jury because of the flexibility enjoyed by the court in arranging the procedural aspects of the trial to fit the needs of the particular case.[195] Another significant administrative consideration is that a judge in a nonjury trial is less likely to commit harmful errors that cause reversal on appeal.[196]

B. The Argument Against the Exception

Recognition of a due process limitation upon the seventh amendment for complex cases would require a pretrial adjudication of complexity.[197] Thus, once a case was determined to be

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1976). *See* Harris & Liberman, *supra* note 14, at 622 n.52. *But see* Higginbotham, *supra* note 1, at 55.

[194] *See* ILC Peripherals Leasing Corp. v. International Bus. Machs. Corp., 458 F. Supp. 423, 448 (N.D. Cal. 1978).

[195] As some commentators have observed:

> [T]he court can be more flexible in terms of manipulating trial procedures in the absence of a jury. Issues can be tried separately. The order of proof can be rearranged. The presentation of charts and summaries can be requested throughout the trial. Supplemental briefs and arguments, and post-trial briefs and submissions, are available to the court upon request.

Harris & Liberman, *supra* note 14, at 623.

[196] A judge in a bench trial has the advantage of reconsidering the admissibility of questionable evidence after the close of the trial and may omit errors from his ultimate opinion. Furthermore, if the complex action involves the interpretation of a statute, error may ensue in a jury trial as a result of the judge's attempt to simplify the statutory language. *See, e.g.,* Thurber Corp. v. Fairchild Motor Corp., 269 F.2d 841, 850-51 (5th Cir. 1959) (it is almost impossible for a trial judge to explain "weird patent language" to a jury in a complex suit).

[197] An alternative to determining the complexity of a case before trial was recognized in *ILC Peripherals.* In that case the court based its determination of the complexity of the case upon its observation of the first trial, which resulted in a mistrial. The court struck the demand for a trial by jury in the event of a retrial, stating:

> [w]hile there may be a right to a jury trial in every case, the court feels that where the cost to both the litigants and the government of such a trial is as great as it was in this case, and where the case is as technically and financially complex as this one is, this right should be limited to one jury trial.

458 F. Supp. at 448.

sufficiently complex, the litigants would be deprived of their seventh amendment right to a trial by jury and the case would proceed on the premise that a judge would be better able to comprehend the issues in the case than a jury. The traditional approach to jury competency would allow the jury to reach a verdict in the suit and then require the judge to balance the accuracy of the verdict against the weight of the evidence. Should this inquiry reveal that the jury had not reached the proper result, the judge would enter a judgment *non obstante veredicto* and correct the jury's error.[198]

A post-verdict analysis of complexity may be expensive in those cases where it is ultimately determined that a jury cannot understand the case,[199] but that price is surely far less than the value of the litigants' constitutional right to a trial by jury. Additionally, the continued use of the post-verdict analysis would avoid the administrative problems that could result from an incorrect adjudication of the complexity of a case prior to trial.[200]

Despite the hue and cry heard in legal circles regarding the incompetence of juries, there is little evidence to support the position that a judge sitting alone is better able to protect the due process rights of litigants in complex cases than is a jury. The assumption that judges are inherently more qualified to resolve difficult issues than are juries has been rejected by courts[201] and

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[198] *See* FED. R. CIV. P. 50(b), (c). *See also* Jones v. Ovenstein, 73 F.R.D. 604, 606 (S.D.N.Y. 1977) (if jury verdict in a complex case is erroneous, the aggrieved party may seek a judgment notwithstanding the verdict).

[199] In *ILC Peripherals* the cost of jury fees alone amounted to $32,000. 458 F. Supp. at 448.

[200] Note, *Unfit for Jury Determination, supra* note 14, at 535. The administrative problems that would arise with a due process exception to the seventh amendment are basically the same as those presented by a complexity exception. *See* notes 130 through 132, 137 and accompanying text *supra*.

[201] Judge Anderson, writing for the majority in *Financial Securities*, noted that judges trained in the law are no more likely than the average juror to comprehend the underlying scientific or technical problems presented by a complex case. 609 F.2d at 431. He stated that the premise that "jurors are incapable of understanding complicated matters . . . unnecessarily and improperly demeans the intelligence of the citizens of this Nation." *Id.* at 430. In a similar vein, the court in *Zenith Radio* stated that on the basis of their experience on the bench it cannot be concluded that judges are superior to juries in resolving complex cases. 478 F. Supp. at 935.

commentators[202] alike. In fact, a strong argument has been made that the ability of a jury to decide a complex case rationally is at least equal to that of a judge.[203]

Judge Patrick Higginbotham[204] has stated that trying a case to a jury operates to simplify a complex case by imposing needed discipline on trial counsel.[205] When technical cases are tried to a judge alone, Judge Higginbotham contends, counsel are less likely to synthesize their cases in an organized, comprehensible fashion, and are more likely to confuse the court and opposing counsel by obfuscating the controlling legal issues in legalistic terminology.[206] This view has been embraced recently by one court which rejected a due process exception to the seventh amendment.[207]

C. Resolving the Clash Between the Seventh and Fifth Amendments in Complex Civil Litigation

Complex civil litigation has engendered a conflict between the seventh amendment's guarantee of a trial by jury and the fifth amendment's proscription against denials of protected interests without due process of law. This clash may be resolved in several ways. A court could interpret the *Ross* test as recognizing

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[202] *See, e.g.*, Higginbotham, *supra* note 1, at 53 ("Apart from the occasional situation in which a judge possesses unique training, however, the assumption that a jury collectively has less ability to comprehend complex material than does a single judge is an unjustified conclusion."); Karcher, *supra* note 2, at 168 (in general, "[t]he composite intelligence, dedication, comprehension, evidence recall, and the emotional balance and ability to render a just, fair and impartial verdict is at least equal to, if not superior to, that of a single judge").

[203] *See In re* United States Financial Sec. Litigation, 609 F.2d 411, 431 (9th Cir. 1979). This proposition was most convincingly stated in *Zenith Radio:*

> [o]ur view is that a jury, applying its collective wisdom, judgment and common sense to the facts of a case (in the light of proper instructions on the law) is brighter, more astute, and more perceptive than a single judge, even in a complex or technical case; at least it is not less so.

478 F. Supp. at 935.

[204] Judge Higginbotham is a District Judge for the United States District Court for the Northern District of Texas.

[205] Higginbotham, *supra* note 1, at 54.

[206] *Id.*

[207] Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 478 F. Supp. 889, 935 (E.D. Pa. 1979) (citing Higginbotham, *supra* note 1, at 54).

certain limits to jury competence and requiring a nonjury proceeding where it appeared that a jury would be unable to render a rational decision.[208] Another approach to resolving the conflicting guarantees of the Constitution could be the striking of a balance between the seventh and fifth amendments.[209] Nevertheless, a court must recognize that the due process clause is applicable in civil cases and that it may operate to limit the right to a jury trial.

Any resolution of the conflicting guarantees of the fifth and seventh amendments should begin with an analysis of the fundamental importance of each amendment. Initially, one must realize that the seventh amendment right to a jury trial is one of the few provisions of the Bill of Rights that has not been applied to the states by incorporation in the fourteenth amendment.[210] Recognition of this fact has led some commentators to conclude that the right to a trial by jury may be less intrinsically important than the due process right of fundamental fairness and other procedural rights embodied in the Constitution.[211] Because the right to a jury trial in civil cases is not absolute,[212] the due process requirement of fundamental fairness may operate in complex civil cases as a justification for limiting the use of juries.

V. Alternatives: Simplification of Complex Civil Litigation

A. Complex Civil Cases and Trial by Jury: New Twist to an Old Problem

The procedural problems raised by technically complex

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[208] Note, *The Right to a Jury Trial, supra* note 14, at 911.

[209] Harris & Liberman, *supra* note 14, at 624.

[210] J. Nowak, R. Rotunda, & N. Young, *supra* note 151, at 414-15. *See* Minneapolis & St. Louis R.R. v. Bombolis, 241 U.S. 211, 217 (1916) (seventh amendment held not applicable to the states); Olesen v. Trust Co. of Chicago, 245 F.2d 522, 524 (7th Cir.) ("[t]rial by jury in civil actions in state courts may be modified by a state or abolished altogether"), *cert. denied,* 355 U.S. 896 (1957).

[211] Harris & Liberman, *supra* note 14, at 624.

[212] Existing constitutional limitations upon a trial by jury include the use of judgments *non obstante veredicto,* directed verdicts, jury instructions, additurs, stipulations, reversals on appeal, general verdicts with interrogatories, and mistrials.

cases have long been a concern of the bar and of the judiciary.[213] The difficulties encountered by litigants in complex civil cases in the late sixties led Congress to pass measures designed to allow transfer of cases for coordinated pretrial proceedings and to create a Judicial Panel on Multidistrict Litigation.[214] The Panel's promulgation of a series of manuals concerning complex and multi-district litigation[215] has contributed significantly to an understanding of many of the problems raised by complex cases.

Today, the anxiety caused by the complex civil case has been heightened by recent attacks upon the competency of juries to decide such cases in a rational manner. The efficient utilization of procedures authorized by the Federal Rules of Civil Procedure and the implementation of innovative trial techniques may simplify many cases that would otherwise be complex.

B. Suggested Procedures & Techniques to Simplify a Complex Case

In *Financial Securities* the court recommended the use of various rules of procedure and evidence to make cases easier for a jury to comprehend.[216] These include a motion to test the sufficiency of an adversary's pleadings,[217] judgments as a matter of law,[218] the appointment of a special master,[219] and the use of summaries of voluminous materials.[220]

Additional methods of simplifying a trial were recognized in *SCM Corp. v. Xerox, Corp.*,[221] a complex case involving patent and antitrust issues. In trying the case, Judge Newman utilized

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[213] *See, e.g.*, McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27 (1950-51); Yankwich, *"Short Cuts" in Long Cases*, 13 F.R.D. 41 (1952).

[214] H.R. REP. No. 1130, 90th Cong., 2d Sess. 2, *reprinted in* [1968] U.S. CODE CONG. & AD. NEWS 1898, 1900. The legislation is presently codified at 28 U.S.C. § 1407 (1976). For an analysis of the Judicial Panel on Multidistrict Litigation created by the Act see McDermott, *The Judicial Panel on Multidistrict Litigation*, 57 F.R.D. 215 (1973).

[215] *E.g.*, FEDERAL JUDICIAL CENTER, MANUAL FOR COMPLEX LITIGATION (1978).

[216] 609 F.2d 411, 428 (9th Cir. 1979).

[217] FED. R. CIV. P. 12.

[218] FED. R. CIV. P. 56.

[219] FED. R. CIV. P. 53(b).

[220] FED. R. EVID. 1006.

[221] 463 F. Supp. 983 (D. Conn. 1978).

many innovative trial techniques: allowing the jury to take notes,[222] use of visual aids,[223] the reading of depositions out of sequence,[224] intermediate charges to the jury,[225] and bifurcation of the trial.[226]

An essential element in enabling a jury to comprehend a complex case is a successful pretrial conference.[227] Other useful procedures and innovations that may simplify a complex case include allowing the jury to take a transcript of the testimony and exhibits to the jury room,[228] the submission to the jury of written instructions which may be understood easily by laymen,[229] and permitting the jury, with the consent of counsel, to submit written questions to the judge.[230]

VI. Conclusion

Since the Supreme Court's decision in *Ross v. Bernhard*, the bench and bar have become involved in a dispute over the ability of juries to handle complex civil cases. This once largely academic debate developed rapidly into a raging controversy when

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[222] Note, *The Right to an Incompetent Jury*, *supra* note 14, at 785. *See Commentary: Note-Taking*, in The Jury System, *supra* note 2, at 25 ("The conferees agreed by a wide margin that jurors should be allowed to take notes."). *See generally* Comment, *Taking Note of Note-Taking*, 10 Colum. J.L. & Soc. Prob. 565 (1973-74).

[223] Note, *The Right to an Incompetent Jury*, *supra* note 14, at 785.

[224] *Id.*

[225] *Id. See* Strawn & Buchanan, *Jury Confusion: A Threat to Justice*, 59 Jud. 478, 483 (1975-76) (giving instructions at the beginning of a trial will help the jury to realize the importance of testimony and evidence that will be introduced during the trial); Note, *Unfit for Jury Determination*, *supra* note 14, at 536-37 ("Detailed instructions on the applicable law, especially when given *before*, as well as after the presentation of the evidence, may also prove helpful in simplifying the jury's task.") (emphasis in original).

[226] 463 F. Supp. at 987-88. Judge Newman separated the antitrust violations, loss of components claim, and the damage claim based on marketing practices. *Id.*

[227] Fed. R. Civ. P. 16. Profitable pretrial conferences have reduced to a few days cases anticipated by counsel to last months. Pollack, *Pretrial Conferences*, 50 F.R.D. 451, 463 (1970). If properly employed, "the pretrial process can greatly simplify the jury's task by narrowing the issues to those basic factual questions truly in dispute." Withrow & Larm, *The "Big" Antitrust Case: 25 Years of Sisyphean Labor*, 62 Cornell L. Rev. 1, 49 (1976-77).

[228] Note, *Unfit for Jury Determination*, *supra* note 14, at 536.

[229] *Id.* at 537. The instructions given to a jury must be phrased in language that is easily understood to improve communication between judge and jury. Strawn & Buchanan, *supra* note 225, at 483.

[230] The Jury System, *supra* note 2, at 25.

several district courts struck demands for a trial by jury in complex cases and recognized a complexity exception to the seventh amendment. Reasoning that a trial by jury in such cases provided the litigants an inadequate remedy at law, these courts heard the cases without a jury on the basis of their traditional equitable powers to assume jurisdiction over complex cases.

The reversal of *Financial Securities* and the decision in *Zenith Radio* signaled the demise of the complexity exception, but failed to offer any guidance as to how litigants in complex civil cases could be guaranteed their due process right to a rational verdict. A due process solution may provide the answer to the problems of the complex case.

If the procedural safeguards provided by the Federal Rules of Civil Procedure and innovative trial techniques do not minimize the risk of an erroneous decision by a jury, due process requires that a judge decide the suit. By applying a functional due process test similar to that employed by the Court in *Mathews v. Eldridge,* nonjury trials in complex civil actions may be required under the due process exception to the seventh amendment.

*Powell G. Ogletree, Jr.**

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Editor's note: As we go to press, it is essential to note that the Court of Appeals for the Third Circuit reversed *Zenith Radio* in *In re* Japanese Elec. Prods. antitrust Litigation, No. 79-2540 (3rd Cir. July 7, 1980), holding that compliance with due process mandates nonjury trials in complex Antitrust litigation. The case was remanded.

RECENT DECISIONS

Antitrust—Clayton Act Section 4—Private Consumers Suffering Monetary Diminution Due to Anticompetitive Conduct Are Injured in Their "Property" Within the Meaning of Section 4

Petitioner,[1] in a class action,[2] sought treble damages under section 4 of the Clayton Act[3] alleging that respondents[4] had committed antitrust violations[5] which had caused an injury in her "property."[6] The district court held that retail consumers who pay increased prices due to anticompetitive conduct are injured in their property within the meaning of the Act.[7] The court stayed further proceedings and certified the issue of consumer standing for interlocutory review.[8] The

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[1] Petitioner, Kathleen Reiter, was a retail purchaser of a hearing aid manufactured by one of the respondents. Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2329 (1979).

[2] Petitioner sought to represent all American purchasers of hearing aids manufactured by respondents. *Id.* at 2329. Class actions are sanctioned by Fed. R. Civ. P. 23.

[3] Clayton Act § 4, 15 U.S.C. § 15 (1976) provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Id.

[4] Respondent hearing aid manufacturers were: Sonotone Corporation, a New York corporation; Beltone Electronics Corporation, an Illinois corporation; Dahlberg Electronics, Inc., a Minnesota corporation; Textron, Inc., a Delaware corporation; and Radioear Corporation, a Delaware corporation. Reiter v. Sonotone Corp., 579 F.2d 1077, 1077 (8th Cir. 1978).

[5] 99 S. Ct. at 2329. Petitioner charged that respondents had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, 15 U.S.C. §§ 1-2, and § 3 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 14. Petitioner alleged that respondents, in concert with their retail dealers, fixed prices of hearing aids and illegally limited the brands, customers, territories and repairs of their retail dealers. 99 S. Ct. at 2329 n.1.

[6] 99 S. Ct. at 2329. Petitioner claimed that the payment of artificially inflated prices for the hearing aids and services purchased at the retail level constituted an injury in her property within the meaning of the Act. *Id.* at 2332.

[7] Reiter v. Sonotone Corp., 435 F. Supp. 933, 937-38 (D. Minn. 1977), *rev'd*, 579 F.2d 1077 (8th Cir. 1978), *rev'd*, 99 S. Ct. 2326 (1979).

[8] 435 F. Supp. at 938. The district court was of the opinion that a "controlling question of law as to which there [was] substantial ground for difference of opinion" had been raised. *Id.*

Court of Appeals reversed[9] and adopted respondents' position that consumers sustain no injury in their "business or property" when they fail to allege an injury of a commercial or competitive nature.[10] On writ of certiorari, the United States Supreme Court, *held*, reversed. Purchasers of goods and services for personal use who suffer monetary damages by reason of antitrust violations are injured in their property for purposes of section 4. *Reiter v. Sonotone Corp.*, 99 S. Ct. 2326 (1979).

The Sherman Act[11] was enacted in response to the concentration of economic power which had resulted from mid-nineteenth century industrialization in the United States.[12] The purpose of the Act was to prevent unfair restraint of competition[13] by contracts, combinations, and conspiracies.[14] In order to aid governmental enforcement of the Act, Congress provided for private treble damages suits under section

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[9] Reiter v. Sonotone Corp., 579 F.2d 1077, 1087 (8th Cir. 1978), *rev'd*, 99 S. Ct. 2326 (1979).

[10] 579 F.2d at 1087. The court based its decision on the legislative histories of the Sherman Act and the Clayton Act, the Supreme Court's decision in Hawaii v. Standard Oil Co., 405 U.S. 251 (1972)("business or property" refers to commercial or competitive interest), and similar decisions of other courts. 579 F.2d at 1078-83.

[11] Sherman Act, ch. 647, 26 Stat. 209 (1890)(current version at 15 U.S.C. §§ 1-7 (1976)).

[12] *See* 21 CONG. REC. 2457 (1890)(remarks of Sen. Sherman that the concentrated economic power of trusts was inconsistent with democratic government and should be restrained). *See generally* P. AREEDA, ANTITRUST ANALYSIS, ¶¶ 132-141, at 18-24 (1967)(background discussion of Sherman Act); Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570, 570 (1964) (concentrations of economic power led to Sherman Act passage).

[13] Apex Hosiery Co. v. Leader, 310 U.S. 469, 493 n.15 (1940).

> The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury.

Id. at 493.

[14] *See, e.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1, 4-5 (1958)(Sherman Act prohibits unreasonable restraints by contracts and combinations); Parker v. Brown, 317 U.S. 341, 351 (1943)(Sherman Act sought to suppress unfair restraint of competition by combinations); Blue Bell Co. v. Frontier Ref. Co., 213 F.2d 354, 358 (10th Cir. 1954)(prohibits unreasonable restraints by contracts, combinations, conspiracies).

In addition, statements made during the floor debates prior to passage of the Act are indicative of Congress' desire to effect this goal. *See, e.g.*, 21 CONG. REC. 2456-57 (1890)(remarks of Sen. Sherman that the object of the Act was to declare trusts and combinations in restraint of trade unlawful); *id.* at 3147 (remarks of Sen. George that bill aimed at the evil of "organized force of wealth").

7.[15] The original language of section 7 authorized suits by persons "injured or damnified" by the prohibited arrangements.[16] This language was later amended[17] to narrow the scope of the section to persons injured in their "business or property."[18] Today, section 7 of the Sherman Act is superseded by section 4 of the Clayton Act,[19] which differs only slightly from section 7.[20] The purposes of the remedies provided under section 4 are to discourage noncompliance with the antitrust laws and to indemnify those who have been injured.[21]

Since the enactment of the Clayton Act considerable controversy has arisen over the standing of potential litigants to sue under section 4.[22] In order to simplify the problem, one commentator has suggested a two-part analysis of the standing question.[23] The first component con-

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[15] See note 3 *supra*. *See* S. REP. No. 619, 84th Cong., 1st Sess. 2, *reprinted in* [1955] U.S. CODE CONG. & AD. NEWS 2328, 2329-30 (§ 7 sought to encourage private litigants to sue to aid government enforcement); *cf., e.g.*, United States v. Borden Co., 347 U.S. 514, 518 (1954) (private and public actions under § 4 of Clayton Act were not meant to be "mutually exclusive" but "cumulative"); Osborn v. Sinclair Ref. Co., 324 F.2d 566, 572 (4th Cir. 1963)(purpose of § 4 of the Clayton Act is to aid government enforcement of the Act); Essex Int'l, Inc. v. Industra Prods., Inc., 64 F.R.D. 361, 363 (N.D. Ind. 1974) (same).

[16] S. REP. No. 1, 50th Cong., 1st Sess. 2 (1889).

[17] *See* 21 CONG. REC. 2901 (1890)(modified version read to Senate).

[18] Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 882 (N.D. Cal. 1977)(reviewing the legislative history of the Act). *See also* 21 CONG. REC. 3149 (1890)(remarks of Sen. Morgan that the Act should not be a "breeder of lawsuits").

[19] Clayton Act § 4, 15 U.S.C. § 15 (1976). The purpose of the Clayton Act was to supplement the Sherman Act and not to amend it. 51 CONG. REC. 9417 (1914)(remarks of Rep. Floyd). *See also* P. AREEDA, *supra* note 12, ¶ 143 at 26 (1967)(list of differences between Clayton Act and Sherman Act).

[20] *Compare* Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890)(current version at 15 U.S.C. § 15 (1976)) *with* Clayton Act § 4, 15 U.S.C. § 15 (1976). The only change was to broaden the scope of § 4 to include all antitrust violations. S. REP. No. 619, 84th Cong., 1st Sess. 2, *reprinted in* [1955] U.S. CODE CONG. & AD. NEWS 2328, 2329.

[21] Pfizer Inc. v. Government of India, 434 U.S. 308 (1978). In this case the Court noted that, based on previous decisions, the purposes underlying § 4 are "to deter violators and deprive them of 'the fruits of their illegality,' and 'to compensate victims of antitrust violations for their injuries.'" *Id.* at 314.

[22] The Supreme Court asserted in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948) that all "victims of the forbidden practices" were protected. *Id.* at 236. In a later case the Court acknowledged the conclusion of lower courts that not all injuries which could be "traced to an antitrust violation" were covered. Hawaii v. Standard Oil Co., 405 U.S. 251, 262-63 n.14 (1972). Lower courts have arrived at this conclusion through the use of standing tests. *See generally* Note, *Standing to Sue in Private Antitrust Litigation: Circuits in Conflict*, 10 IND. L. REV. 532 (1977) (discussion of tests used to limit standing under § 4).

[23] *See* 31 VAND. L. REV. 1531, 1532 (1978)(analysis of standing as it relates to private

sists of the causal relationship between the alleged injury and the alleged violation.[24] This concept is analogous to the proximate cause concept of tort law.[25] In attempts to narrow the scope of standing, the circuit courts of appeal have developed several tests to determine whether such a causal relationship exists.[26] Although the Supreme Court has not sanctioned any particular standing test, in *Illinois Brick Co. v. Illinois*,[27] the Court limited standing under section 4 to direct

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noncommercial consumer).

[24] *Id.* at 1532. "[T]he plaintiff must show . . . that the alleged injury occurred by reason of the antitrust violation." *Id.*

[25] *See, e.g.*, Tyler, *Private Antitrust Litigation: The Problem of Standing*, 49 U. COLO. L. REV. 269, 270 (1978)(examination of § 4 standing from several perspectives).

> Proximate cause attempts to strike a balance between safety costs and injury costs by identifying those points at which pressures can be applied to secure the desired social goal of minimizing the losses due to injuries. Similarly, courts applying restrictive tests of standing in private antitrust suits appear to be balancing the losses due to anticompetitive behavior against the costs of securing more competitive behavior.

Id.

[26] Generally, the First and Third Circuits apply the "direct injury" test requiring no intermediaries between plaintiff and defendant. *See, e.g.*, Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910)(stockholder-creditor of injured corporation was not directly injured); Miley v. John Hancock Mut. Life Ins. Co., 148 F. Supp. 299, 302 (D. Mass.) (insurance broker suing insurance company and insurance commission for conspiracy was not directly injured), *aff'd per curiam*, 242 F.2d 758 (1st Cir.), *cert. denied*, 355 U.S. 828 (1957). The Second, Fourth, Fifth, Seventh, Eighth, Ninth and District of Columbia Circuits apply variations of the "target area" test, requiring plaintiff to be within the segment of the economy at which the alleged violations are aimed. *See, e.g.*, Jeffrey v. Southwestern Bell, 528 F.2d 1129, 1131-32 (5th Cir. 1975)(telephone customers' injuries are not in target area of telephone company's alleged violations); Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358, 365 (9th Cir. 1955)(injuries caused by defendant to purchasers from plaintiff-manufacturer gave plaintiff standing). The Sixth Circuit has applied the "zone of interest" test which requires the plaintiff to allege an injury in fact and within the area protected by the statute. *See, e.g.*, Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1149 (6th Cir. 1975)(investment corporation allowed to sue noncompetitor oil company). The Ninth Circuit has developed the "foreseeability" test. *See, e.g.*, Blankenship v. Hearst Corp., 519 F.2d 418, 424 (9th Cir. 1975)(newspaper distributor could sue publisher who allegedly fixed prices at which distributor's carriers could sell). *See generally* Sherman, *Antitrust Standing: From Loeb to Malamud*, 51 N.Y.U.L. REV. 374 (1976)(discussion of standing tests; who may sue); Note, *supra* note 22, at 532-55 (same).

[27] 431 U.S. 720 (1977). The state of Illinois and local government entities brought suit under § 4 against Illinois Brick Company and other manufacturers of concrete blocks alleging price fixing. Illinois further contended that the overcharges were passed through the chain of distribution from masonry contractors to general contractors and in turn to the plaintiffs who purchased buildings constructed with the blocks. Thus, Illinois was an indirect purchaser from Illinois Brick. *Id.* at 726-27. The district court granted the manufacturers' motion for partial summary judgment against the indirect purchas-

purchasers only. There the Court held that in suits against alleged violators of antitrust laws, indirect purchasers may not predicate liability for alleged overcharges purported to have descended to them through the chain of distribution on a "pass-on" theory.[28] Thus, with few exceptions, only direct purchasers may seek treble damages against a manufacturer under section 4 based on allegations of price fixing.[29] The second component involves the type of injury alleged,[30] and it is here that an interpretation[31] of the phrase "business or property" becomes important.[32] Several courts have held that the alleged injury

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ers, holding that since the blocks were used to produce another product, the plaintiffs were too remote from the alleged violation to have standing under § 4. Illinois v. Ampress Brick Co., 67 F.R.D. 461, 468 (N.D. Ill. 1975), *rev'd*, 536 F.2d 1163 (7th Cir. 1976), *rev'd sub nom.* Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977). The Court of Appeals for the Seventh Circuit reversed on the basis of standing. The Supreme Court did not address the standing question but reversed on other grounds. 431 U.S. at 728 n.7.

[28] 431 U.S. at 728, 735. The Court based its holding on the decision in Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968), in which the Court held that an alleged violator may not use the "pass-on" doctrine as a defense against its direct purchasers. *Id.* at 494. The defendant manufacturer maintained that the direct purchaser had borne no loss since any unlawful overcharge was recovered by the direct purchaser's increase in prices charged to its customers. *Id.* at 487-88. The Court in *Illinois Brick* reasoned that since the "pass-on" theory could not be used defensively by a manufacturer against a direct purchaser, an indirect purchaser should not be permitted to use it offensively. 431 U.S. at 728-29. In so ruling the Court sought to avoid "new dimensions of complexity" in treble damages suits and "massive multiparty litigation involving many levels of distribution." *Id.* at 737, 740.

[29] 431 U.S. at 746. The Court reiterated the two exceptions stated in *Hanover Shoe* which permit a "pass-on" defense to be employed when there is a pre-existing cost-plus contract or where the customer owns or controls the direct purchaser. *Id.* at 736 n.16. The Court limited the instant ruling to these exceptions. *Id.* at 745.

It should be noted that the second exception as stated by the Court is unclear. The Court referred to a situation where the customer controls the direct purchaser and cited two cases as support. *Id.* at 736 n.16. But these cases deal with situations involving control of the direct purchasers by the supplier. *See* Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969)(retailer and dealer controlled by wholesaler-direct purchaser); *In re* Western Liquid Asphalt Cases, 487 F.2d 191, 197, 199 (9th Cir. 1973)(contractor-direct purchasers controlled by asphalt supplier), *cert. denied*, 415 U.S. 919 (1974). *See generally* Note, *Antitrust Law—Private Actions: The Supreme Court Bars Treble-Damage Suits by Indirect Purchasers*, 56 N.C.L. Rev. 341 (1978)(review of *Illinois Brick*).

[30] *See* 31 Vand. L. Rev. 1531, 1532 (1978). ("[T]he plaintiff must show . . . that the alleged injury to business or property was of a type protected by section 4.").

[31] *Cf.* United States v. Menasche, 348 U.S. 528, 538-39 (1955) (every word of a statute should be given meaning if at all feasible).

[32] *Compare, e.g., In re* Multidistrict Vehicle Air Pollution, 482 F.2d 122, 126 (9th Cir.) (injury must be in commercial venture or enterprise), *cert. denied*, 414 U.S. 1045 (1973) *and* GAF Corp. v. Circle Floor Co., 463 F.2d 752, 757-58 (2d Cir. 1972)(plaintiff must suffer some diminution of ability to compete), *cert. denied*, 413 U.S. 901 (1973)

must have been sustained in a commercial enterprise or commercial interest in order to meet the "business or property" requirement of section 4.[33] Other courts have held that a commercial injury is not a prerequisite to standing under section 4.[34] An early Supreme Court case, *Chattanooga Foundry & Pipe Works v. City of Atlanta*,[35] held that where a city had been wrongfully forced to purchase pipe for its waterworks system from an illegal trust which had been formed for the purpose of price fixing,[36] the ensuing monetary loss by the city constituted an injury in property apart from any injury suffered by the city in its waterworks business.[37] *Chattanooga Foundry* thus indicates that injury in property has a meaning independent of injury in business; this conclusion has been the subject of considerable debate, however.[38] In a more recent decision, *Hawaii v. Standard Oil Co.*,[39] the Supreme Court indicated in dicta that "business or property" referred to "com-

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with Cleary v. Chalk, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973)(overcharges for consumer goods and services constitute injury in property), *cert. denied*, 415 U.S. 938 (1974) *and In re* Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litigation, [1977-1] TRADE REG. REP. (CCH) ¶ 61,639 at 72,629 (C.D. Cal. 1977)(injury need not be in a commercial or competitive activity).

[33] *See, e.g.*, Tugboat, Inc. v. Mobile Towing Co., 534 F.2d 1172, 1175 (5th Cir. 1976) (injury in commercial interests or enterprises); Reibert v. Atlantic Richfield Co., 471 F.2d 727, 730 (10th Cir.)(injury in commercial venture or enterprise), *cert. denied*, 411 U.S. 938 (1973); Ragar v. T.J. Raney & Sons, 388 F. Supp. 1184, 1187 (E.D. Ark.)(injury to competitive position in business), *aff'd per curiam*, 521 F.2d 795 (8th Cir. 1975).

[34] *See, e.g.*, Cleary v. Chalk, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973)(overcharges to consumers of goods and services produce injury), *cert. denied*, 416 U.S. 938 (1974); Theophil v. Sheller-Globe Corp., 446 F. Supp. 131, 132 (E.D.N.Y. 1978)(paying more than worth of an article is injury); *cf.* Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) (property has wider scope than business and involves value judgment).

[35] 203 U.S. 390 (1906).

[36] *Id.* at 395-96. Although suit was brought under § 7 of the Sherman Act, the case is still important since the language of § 7 and § 4 of the Clayton Act is virtually the same.

[37] *Id.* "A person whose property is diminished by a payment of money wrongfully induced is injured in his property." *Id.* The Court reasoned that there is a distinction between injury "to property" and injury "in business or property." *Id.* at 399. One commentator explains that in choosing the statutory words "in property," which are broader than "to property," Congress was attempting to protect injuries in property in a general sense, not specific items of property. *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977) 771 n.3.

[38] *Compare, e.g.*, Cleary v. Chalk, 488 F.2d 1315, 1319 n.17 (D.C. Cir. 1973)(citing *Chattanooga Foundry* to support illegal overcharges as injury in property), *cert. denied*, 416 U.S. 938 (1974) *with* Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 885 n.6 (N.D. Cal. 1977) (must show injury to competitive interest; *Chattanooga Foundry* not contrary since city was in business).

[39] 405 U.S. 251 (1972).

mercial interests or enterprises."[40] There, the state of Hawaii brought an action under section 4 for damages to its general economy resulting from the defendant's alleged violation of antitrust laws.[41] The Court denied Hawaii's right to recover since it had failed to demonstrate an injury to any commercial interest.[42] Nevertheless the Court observed that Hawaii would have standing to sue in its proprietary capacity as a "consumer in the marketplace."[43] Still another case dealing with the scope of the term "property" is *Waldron v. British Petroleum Co.*[44] There, the district court held that a contract is a protectable property interest within the meaning of section 4.[45] The court further stated that injury in property has a wider scope, is more extensive, and requires less proof than injury in business.[46]

The right of private consumers to seek relief under section 4 has also been recognized by the Supreme Court.[47] In *Goldfarb v. Virginia*

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[40] *Id.* at 264.

[41] *Id.* at 253-54. Hawaii alleged that the respondent oil company was guilty of violations of antitrust laws regarding the sale, distribution, etc., of petroleum products. Hawaii sued in its capacity as *parens patriae* alleging injury to its general economy. *Id.*

The doctrine of *parens patriae* permits a state, in its capacity as "quasi-sovereign," to sue on behalf of its citizens for damages resulting from anticompetitive conduct. D. ELZINGA & W. BREIT, THE ANTITRUST PENALITIES: A STUDY IN LAW AND ECONOMICS 92 n.25 (1976). *See generally* Handler & Blechman, *Antitrust and the Consumer Interest: The Fallacy of Parens Patriae and a Suggested New Approach*, 85 YALE L.J. 626 (1976)(general discussion).

[42] 405 U.S. at 264.

[43] *Id.* at 263 n.14. *See also* L. SULLIVAN, *supra* note 37, at 771 n.3 for an explanation of the Court's rationale.

[44] 231 F. Supp. 72 (S.D.N.Y. 1964).

[45] *Id.* at 86. Plaintiff had an oil importation contract which he alleged had been unlawfully affected by a conspiracy. *Id. Cf.* DeGregorio v. Segal, 443 F. Supp. 1257, 1262-63 (E.D. Pa. 1978) (denial of benefit of two income exemptions for medicaid constituted injury in property). *But cf.* Hammon v. United States, 267 F. Supp. 420, 432 (D. Mont. 1967)(loss of consortium held not an injury in property under § 4), *appeal dismissed*, 399 F.2d 673 (9th Cir. 1968).

[46] 231 F. Supp. at 86. The court reasoned that:

> The word "property" is, in a sense, a conclusory term, i.e., an interest which the law protects. A determination whether plaintiff has "property" involves a value judgment as to whether that which plaintiff factually possesses should be legally protected. If it be decided that the rights, privileges and powers possessed by plaintiff should receive judicial sanction, that conclusion would be expressed by declaring that plaintiff possesses "property."

Id.

[47] *See, e.g.*, Pfizer Inc. v. Government of India, 434 U.S. 308, 313-15 (1978)(Congress did not intend to give remedy only to American consumers; foreign governments may also sue); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968)(implies that ultimate buyer of shoes has right to sue).

State Bar,[48] the Court held that minimum fee schedules established by state and local bar associations constituted price fixing and granted standing to sue to persons who required services included in the schedules.[49] Later, in examining the legislative history of section 4, the Court reiterated in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[50] that private consumers are within the class protected by the statute.[51] Similarly, several lower courts have granted standing to noncommercial consumer challengers of price fixing schemes without expressly addressing the "business or property" issue.[52] In *Cleary v. Chalk*,[53] however, although its decision was based on other grounds,[54] the District of Columbia Circuit stated that a consumer wrongfully forced "to pay more than the worth of a product or service was injured in his prop-

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[48] 421 U.S. 773 (1975).

[49] *Id.* at 780, 783. Petitioners (husband and wife) sought to purchase a home in Fairfax County, Virginia, but were forced to procure a title examination in order to acquire the requisite title insurance. Only members of the state bar were authorized to do the examinations. The county bar maintained a minimum fee schedule used by most attorneys to charge for the services. Petitioner brought suit for price fixing. *Id.* at 775-76.

[50] 429 U.S. 477 (1977). This was a suit for damages under § 4 by bowling centers against a bowling equipment manufacturer and operator alleging monopolistic activities. *Id.* at 479-81. Plaintiffs were held to have standing to sue, but the Supreme Court remanded the case for further proceedings. *Id.* at 490-91.

[51] *Id.* at 486 n.10. Further legislative history lends support to the Court's conclusion. During the floor debates on the Sherman Act, Senator Pugh expressed his view that trusts and combinations destroy competition and increase prices to consumers. 21 CONG. REC. 2558 (1890)(remarks of Sen. Pugh). During debates on jurisdiction under § 7, Senator Sherman spoke of the inadequacy of the remedy provided the "single individual whose bread has been advanced in price." *Id.* at 2569 (remarks of Sen. Sherman). Senator Coke pondered how a citizen "plundered in his family consumption of sugar by the sugar trust" could have an effective remedy. *Id.* at 2615 (remarks of Sen. Coke).

[52] *See, e.g., In re* Master Key Antitrust Litigation, 528 F.2d 5, 7 (2d Cir. 1975)(building owners sued hardware manufacturer alleging price fixing); West Virginia v. Charles Pfizer & Co., 440 F.2d 1082, 1083 (2d Cir.) (private individual consumers sued drug company for price fixing), *cert. denied*, 404 U.S. 871 (1971); Bosche v. General Motors Corp., 59 F.R.D. 589, 589, 597 (N.D. Ill. 1973) (private automobile purchasers sued manufacturer for price fixing); *cf.* Nader v. Air Transp. Ass'n, 426 F. Supp. 1035, 1037 (D.D.C. 1977) (private consumers suing trade association of air carriers had standing under § 16 of Clayton Act, comparable to § 4). *See also* Pfizer Inc. v. Government of India, 434 U.S. 308, 313 (1978) (foreign governments have standing).

[53] 488 F.2d 1315 (D.C. Cir. 1973), *cert. denied*, 416 U.S. 938 (1974). The class action was instituted by a regular fare-paying passenger on defendant transit line on behalf of himself and other passengers for alleged violations of § 10 of the Clayton Act, 15 U.S.C. § 29 (1970). 488 F.2d at 1317-18.

[54] 488 F.2d at 1324. The Court held that transfers of several parcels of land by the transit company to its wholly owned subsidiaries in exchange for stock was not prohibited by § 10. *Id.*

erty."[55] The "business or property" issue was determinative in a trilogy of cases decided by the Northern District of California in 1977.[56] In one of the cases, *Weinberg v. Federated Department Stores, Inc.*,[57] private, retail consumers charged that several retail department stores had artificially inflated prices of women's apparel[58] such that individual consumers were forced to pay more than the worth of the articles and thereby were injured in their "business or property."[59] The companion cases also involved private, noncommercial plaintiffs.[60] In identical opinions, the court denied standing to each of the noncommercial plaintiffs, holding that to avail themselves of section 4, consumers must claim an injury to a business or commercial interest.[61] The court reasoned that the phrase "business or property" should be read as a conjunctive phrase and thus would apply only to business interests.[62] The court also maintained that protection of private consumers injured by price fixing is the responsibility of Congress.[63] In *Theophil v. Sheller-Globe Corp.*,[64] the Eastern District of New York conversely

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[55] *Id.* at 1319 n.17.

[56] Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 881 (N.D. Cal. 1977)(private purchasers of clothing sued retail department stores); Gutierrez v. E. & J. Gallo Winery Co., 425 F. Supp. 1221, 1222 (N.D. Cal. 1977)(private consumers sued wine manufacturer); Smith v. Toyota Motor Sales, U.S.A., Inc., [1977-1] TRADE REG. REP. (CCH) ¶ 61,251 at 70,760-61 (N.D. Cal. 1977)(automobile purchasers sued dealers).

[57] 426 F. Supp. 880 (N.D. Cal. 1977).

[58] *Id.* at 881.

[59] *Id.* at 881-82.

[60] *See* note 56 *supra*.

[61] 426 F. Supp. at 885. The court reached its decision after a thorough analysis of the legislative history and judicial interpretation of § 4. *Id.* at 882-85. *But cf.* Bravman v. Bassett Furniture Indus., Inc., 552 F.2d 90, 98-99 n.23 (a "competitors only" rule would prevent "victimized customers of a price fixing conspiracy" from suing), *cert. denied*, 434 U.S. 823 (1977). *See* note 35 *supra*.

[62] 426 F. Supp. at 884. The court noted that the phrase "business or property" could not apply to "pure business interests" or "pure property interests, in the disjunctive." *Id. But cf.* Waldron v. British Petroleum Co., 231 F. Supp. 72, 86 (S.D.N.Y. 1964) ("property" has wider scope and is more extensive than "business"). *See* note 45 *supra*.

[63] 426 F. Supp. at 885. The court maintained that, despite its decision, private consumers are not without a remedy. Pointing to the Hart-Scott-Rodino Antitrust Improvement Act of 1976, 15 U.S.C. § 15c-f (1976), the court asserted that the *parens patriae* provision therein was the appropriate remedy for individual consumers. Conceding that this avenue may leave consumers virtually unprotected since they are dependent upon the discretion of the Attorney General, the court nevertheless concluded that only Congress and not the court could broaden the scope of § 4. 426 F. Supp. at 885-86.

[64] 446 F. Supp. 131 (E.D.N.Y. 1978). Plaintiff was a private consumer who alleged that defendant dealer sold plaintiff a 1971 model motor home, representing it to be a 1972 model. Plaintiff claimed that the change was made to enable defendant to charge the higher price of the newer models. *Id.* at 132.

held that retail purchasers of goods suffer injury to their pocketbooks when they are forced to pay illegally fixed higher prices and thus are injured in their property[65] within the meaning of section 4.[66] In so ruling, the court relied upon the assumption that the objective of the antitrust laws was protection of consumers.[67] The court was also rather prophetic in predicting that the Supreme Court would grant standing to retail, noncommercial consumers under section 4.[68]

In the instant case, the Court[69] noted that in the construction of a statute, effect must be given to the meaning of every word where possible.[70] Therefore, the Court reasoned, since Congress had used the disjunctive "or" to connect the words "business" and "property,"[71] then "property" should be given independent significance.[72] The Court further recognized that anticompetitive conduct giving rise to artificially inflated prices of retail goods and services causes consumers who purchase such goods and services for personal use to suffer monetary losses.[73] Hence, the Court held that since monetary injury alone may constitute injury in one's property,[74] then retail consumers injured in their pocketbooks by anticompetitive practices are injured in their "property" within the meaning of section 4.[75] Finally, the Court observed that its previous recognition of the right of consumers of goods and services to sue under section 4,[76] coupled with the absence of any

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[65] *Id.* at 138. *Accord, In re* Coordinated Pretrial Proceedings in Petroleum Prods. Antitrust Litigation, [1977-1] TRADE REG. REP. (CCH) ¶ 61,639 at 72,629 (C.D. Cal. 1977)(wrongfully induced payment of money is injury in property). *Contra*, Weinberg v. Federated Dep't Stores, Inc., 426 F. Supp. 880, 885 (N.D. Cal. 1977)(injury to pocketbook is not enough; must be commercial interest). *See* notes 32 and 33 *supra.*

[66] *See* note 3 *supra.*

[67] 446 F. Supp. at 135.

[68] *Id.* The court maintained that, through dicta and presuppositions in its recent decisions, the Supreme Court had indicated that it would so decide. *Id.*

[69] Reiter v. Sonotone Corp., 99 S. Ct. 2326 (1979). The opinion, written by Chief Justice Burger, expressed the unanimous decision of the Court. Justice Rehnquist wrote a brief concurrence. Justice Brennan took no part in the decision.

[70] *Id.* at 2331. The Court relied on United States v. Menasche, 348 U.S. 528, 538-39 (1955)(must give every word of statute effect). 99 S. Ct. at 2331. *See* note 33 *supra.*

[71] 99 S. Ct. at 2331. The Court stated that Congress' use of the word "or" made it clear that " 'business' was not intended to modify 'property' nor was 'property' intended to modify 'business.' " *Id.*

[72] *Id.* According to the Court, the term "property" "comprehends anything of material value owned or possessed." *Id.* at 2330.

[73] *Id.* at 2331, 2332.

[74] *Id. See* notes 35 through 37 and accompanying text *supra.*

[75] 99 S. Ct. at 2331-33.

[76] *Id.* at 2332 (citing Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975)(persons seeking legal services when buying residence had standing)). *See* notes 48, 49 and accom-

express consideration of consumer standing in the legislative history of the Act,[77] did not justify denial of standing to purchasers of retail goods and services for personal as opposed to commercial use.[78]

The import of the decision in the instant case cannot be underestimated. Not only has it settled a controversial issue on which opinions have been sharply divided,[79] but it has placed a powerful weapon in the hands of private retail consumers to combat anticompetitive forces. In its unanimous decision that consumers who are victims of price fixing schemes are injured in their property,[80] the Court has removed a major obstacle to consumer standing under section 4. Furthermore, the independent significance given the word "property"[81] disposes of the *Weinberg*[82] requirement that injury must be to a commercial or competitive interest in order for the consumer to avail himself of a section 4 remedy.[83] Inasmuch as the *Weinberg* requirement was a product of litigation in which plaintiffs were almost exclusively business entities,[84] reevaluation was necessary with the increase in incidence of retail consumers as section 4 plaintiffs. By insisting that consumers meet such

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panying text *supra*. The Court also noted that its reference to "consumers" as entitled to sue under § 4 did not imply that those purchasing goods and services for personal use were excluded. *See, e.g.*, Pfizer, Inc. v. Government of India, 434 U.S. 308, 313-15 (1978)(foreign nation suing drug manufacturer had standing; helps protect American consumers); Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486 n.10 (1977) (floor debates on Sherman Act show provision for individuals, especially consumers). 99 S. Ct. at 2332. *See* notes 47, 50, 51 and accompanying text *supra*.

[77] 99 S. Ct. at 2333. The Court pointed out that the legislative histories of the Clayton Act and Sherman Act indicate that consumers who are overcharged due to price fixing are protected. *See* 21 CONG. REC. 2457 (1890)(remarks of Sen. Sherman as to prevention of producers' increased profits at consumers' cost); *id.* at 2558 (remarks of Sen. Pugh about destruction of competition leading to increased prices to consumers). 99 S. Ct. at 2333. *See* note 51 *supra*.

[78] 99 S. Ct. at 2333. The Court stated that the potential flood of litigation that could result from its holding and the possible ruinous effects on small businesses were considerations that should be addressed by Congress. The Court urged the district courts to be "alert to identify frivolous claims." Justice Rehnquist, in a concurring opinion, stated that the decision was not a complete solution to the courts on the "firing line." He also expressed doubts as to whether class actions would ultimately benefit consumers; the attorney who often receives a large fee for representing a consumer class would be the likely beneficiary, he said. *Id.* at 2333, 2334.

[79] *See* notes 56 through 68 and accompanying text *supra*.

[80] 99 S. Ct. at 2333.

[81] *Id.* at 2331. *See* notes 70 through 72 and accompanying text *supra*.

[82] 426 F. Supp. 880 (N.D. Cal. 1977).

[83] *Id.* at 885. *See* notes 57 through 63 and accompanying text *supra*.

[84] *See* note 33 and accompanying text *supra*.

an exacting requirement, any probability of recovery was stifled[85] since retail consumers rarely possess any commercial interest vulnerable to illegal conduct. It follows, then, that if one's wealth is his property, the plain language of section 4 compelled the Court's decision here.[86]

The decision here is a fair and equitable one. Legislative history indicates that the ultimate goal of antitrust legislation is the protection of consumers.[87] Moreover, section 4 was designed to supplement governmental enforcement of these laws.[88] From the standpoint of deterrence, retail consumers may be the only group likely to seek redress for anticompetitive conduct. This is so since those who precede the ultimate consumer in the chain of distribution may have little incentive to sue the violator because of expected commercial repercussions or because they, too, may reap the benefits of the anticompetitive practices.[89] Since, in the final analysis, consumers stand to bear the brunt of most violations, there appears to be no better way of accomplishing the objectives of the Act than to grant the retail consumer standing to sue.

Despite the decision in the instant case, there remain several limitations on consumer standing. The issue of causation and the tests employed by the various circuits[90] to determine causation will continue to restrict the number of consumer suits. Thus, even if a plaintiff can establish that he has sustained an injury in property he may still have to show the directness of his injury or that his injury was within the target area.[91] Furthermore, since *Illinois Brick*[92] bars the use of the "pass-on" doctrine by indirect purchasers in suits against manufacturers, suits by retail purchasers of goods and services generally would be precluded.[93] However, in situations where the manufacturer controls the direct purchasers or retailers, the consumer-plaintiff would fall within

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[85] *See* notes 10, 57 through 63 and accompanying text *supra*.

[86] *See* note 81 *supra*.

[87] *See* note 51 and accompanying text *supra*.

[88] *See* notes 15 through 20 and accompanying text *supra*.

[89] *See* 31 VAND. L. REV. 1531, 1545-47 (1978)(excellent analysis of the argument that retail consumers may be the only injured group likely to sue under § 4).

[90] *See* notes 24 through 26 and accompanying text *supra*.

[91] If suing in the Sixth Circuit, plaintiff would have to show that the injury was within the area protected by the statute. If suing in the Ninth Circuit, plaintiff would have to show that his injury was foreseeable. *See* note 26 *supra*.

[92] Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977).

[93] *Id.* at 728-29. *See* notes 27, 28 and accompanying text *supra*. The Court noted in the instant case, however, that the direct-purchaser rule of *Illinois Brick* was not before it. 99 S. Ct. at 2330 n.3.

an exception to the *Illinois Brick* limitation[94] and would be permitted to offer proof of his claim. In the instant case, it is foreseeable that on remand the plaintiffs may qualify under the exception, provided they are successful in proving their allegations of collusion between the defendant manufacturers and retailers.[95] The importance of qualification under the exception is even greater where, as here, the retailers likely would not be motivated to bring suit. Consequently, unless the plaintiffs in the instant case are allowed to maintain their action, the alleged illegal activity will go unchecked.[96] The *Illinois Brick* limitation is thus an impenetrable barrier to consumers who do not qualify under the exception. *Reiter* has eliminated one obstacle to section 4 suits by consumers,[97] but in reaching its decision, the Court expressly refused to address the additional obstacle posed by *Illinois Brick*.[98] Thus *Illinois Brick* remains viable and will continue to curtail consumer litigation under section 4 until Congress legislates a less stringent requirement.[99]

Finally, much concern has been expressed that the Court's decision would open the floodgates for litigation and burden the already overloaded dockets of federal courts.[100] The Supreme Court recognized that such a result was likely but insisted that the protection of consumers had priority over considerations of overloaded court dockets.[101] In this age of consumer awareness, it is highly probable that the instant decision will serve as a catalyst for future litigation commenced by those consumers and attorneys who are aware enough[102] to use the power of a lawsuit to vindicate their claims. Although few individuals likely will be motivated to sue of their own accord, the awesome effect of class actions, in light of *Reiter*, could prove to be a major factors in the competitive world and even ruinous to the small businessman.[103] The Court declared, however, that such considerations were better left

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[94] *See* note 29 *supra*.

[95] *See* Reiter v. Sonotone Corp., 99 S. Ct. 2326, 2329 n.1 (1979) (listing specific charges).

[96] *See generally* Note, *supra* note 24, at 348-53.

[97] *See* notes 75, 78 and accompanying text *supra*.

[98] 99 S. Ct. at 2330 n.3.

[99] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 734 n.14 (1976) (indicating that any changes must come from Congress).

[100] *See* Reiter v. Sonotone Corp., 579 F.2d 1077, 1086 (8th Cir. 1978) (expressing the fear that the cost of settlement would be passed on to consumers and would ruin small businesses), *rev'd*, 99 S. Ct. 2326, 2333-34 (1979)(respondents fear same).

[101] 99 S. Ct. at 2333-34.

[102] *See id.* at 2334 (Rehnquist, J., concurring)(expressing the view that the primary benefit may accrue to class action attorneys).

[103] *Id.*

to Congress.[104] Nevertheless, the Court's concern is not without foundation, and the effect of *Reiter* ultimately may be of major significance in the economic sphere.

Wendy G. Evinger

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[104] *Id.* at 2333-34.

Constitutional Law—Search and Seizure—Police Cannot Arrest Person for Refusing to Provide Identification in the Absence of a Reasonable Suspicion of Criminal Conduct

Appellant[1] sought reversal of a conviction for violation of a Texas statute[2] that made it unlawful for a person to refuse to identify himself to police officers upon request after a lawful stop.[3] When officers accosted appellant and demanded identification, he protested and refused to comply with the demand.[4] Appellant was convicted for the violation in municipal court.[5] Upon a trial de novo in county court, appellant moved to set aside the information on grounds that the statute violated the first, fourth, and fifth amendments and was unconstitutionally vague in violation of the fourteenth amendment.[6] The prosecution argued that the statute was essential for the protection and security of citizens and contended that the stop was lawful since the officers suspected criminal activity.[7] The county court denied appellant's motion and convicted him upon a factual finding that the stop was lawful.[8] On appeal[9] to the United States Supreme Court, *held,* reversed. The fourth amendment requires that police officers have at least a reasonable suspicion, based on objective facts, that a person is

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[1] Appellant, Zackary Brown, was arrested by El Paso police on December 9, 1977. Brown v. Texas, 99 S. Ct. 2637, 2639 (1979).

[2] Tex. Penal Code Ann. tit. 84, § 38.02(a) (Vernon 1974) provides: "A person commits an offense if he intentionally refuses to report or gives a false report of his name and residence address to a peace officer who has lawfully stopped him and requested the information."

[3] 99 S. Ct. at 2639.

[4] *Id.* Appellant was arrested in an alley during the noon hour by two police officers who observed him and another man walking away from each other in an alley known to be frequented by drug users. Following a request for identification and an explanation of his presence in the alley and appellant's refusal to provide the information, a search of him was conducted but revealed nothing illegal. The other man was not questioned. One officer testified that appellant looked suspicious and had not been seen in the area before. *Id.*

[5] *Id.* at 2640. The El Paso Municipal Court convicted appellant and fined him $20 plus court costs. *Id.*

[6] *Id.*

[7] *Id.* at 2640-41, 2642 app.

[8] *Id.* at 2640. Appellant waived his right to a jury trial. The El Paso County Court convicted appellant and fined him $45 plus court costs. *Id.*

[9] Under the Texas law an appeal from an inferior court to a county court is subject to review only when there is a fine exceeding $100. Tex. Code Crim. Proc. Ann. art. 4.03 (Vernon 1977). Since the county court that convicted appellant was the highest court in the state that could hear the case, the United States Supreme Court had proper appellate jurisdiction under 28 U.S.C. § 1257(2) (1976).

involved in criminal activity in order to detain the person and require identification. *Brown v. Texas,* 99 S. Ct. 2637 (1979).

While English peace officers had authority at common law to detain persons suspected of criminal activity,[10] the common law did not allow the government to search and seize a citizen's property unless a superior right could be asserted in that property.[11] English justices did issue warrants for the search and seizure of stolen goods provided an oath was given that the goods were stolen.[12] Under George III, general warrants were issued to the so-called King's messengers to arrest anyone and to search any house in order to apprehend authors of alleged libels and to seize their papers.[13] Mindful of such abusive intrusions by the English government, the framers of the American Constitution sought to bestow upon Americans a guarantee against overreaching warrants and unreasonable governmental intrusion.[14] This guarantee is embodied in the fourth amendment[15] to the United States Constitution. The amendment contains two clauses, the first forbidding unreasonable searches and seizures and the second specifying certain required particulars before a warrant can issue.[16]

Boyd v. United States[17] represents the first significant interpreta-

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[10] Lawrence v. Hedger, 3 Taunt. 14, 15, 128 Eng. Rep. 6, 7 (C.P. 1810).

[11] Boyd v. United States, 116 U.S. 616, 623-27 (1886). The common law authorized seizure of stolen goods since the true owner had a superior property right. The government was authorized by statute to acquire property rights in goods forfeited for breach of revenue laws. *Id.* at 623. The power to search for stolen property was eventually extended to general contraband or any property that was illegal to possess. This included the instrumentalities of crime because of the early notion that items used in the perpetration of crimes were forfeited to the state. Warden v. Hayden, 387 U.S. 294, 303 (1967).

[12] Entick v. Carrington, 19 How. St. Tr. 1029, *reprinted in* [1558-1774] All E.R. Rep. 41, 45 (C.P. 1765).

[13] *See generally* Fraenkel, *Concerning Searches and Seizures,* 34 HARV. L. REV. 361, 362-65 (1921) (pre-fourth amendment history of search and seizure).

[14] T. TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 38-44 (1969). The author concludes, however, that the framers of the Constitution were not concerned with warrantless searches. *Id.* at 38.

[15] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particulary describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

[16] *Id.*

[17] 116 U.S. 616 (1886). *Ex parte* Jackson, 96 U.S. 727 (1877), was the only case that commented at any length on the fourth amendment before the *Boyd* decision. The Court remarked in dictum that letters in the mail could not be opened without a warrant. *Id.* at 733.

tion given the fourth amendment by the Supreme Court. Relying on common law authority,[18] the Court concluded that the reasonableness clause provided protection of personal privacy supplementary to and independent of the warrant clause.[19] Searches and seizures in violation of the warrant clause were considered initially in *Weeks v. United States*.[20] In *Weeks*, the Court held that the Constitution mandated exclusion of evidence obtained in violation of the warrant clause[21] and declared that if private documents seized without a warrant were used as evidence, the fourth amendment right to be secure against such searches and seizures was of no value.[22] Thus, the exclusionary rule was enacted to protect the constitutional rights of the accused, regardless of the governmental interest in crime prevention.[23] The application of

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[18] The *Boyd* opinion relied heavily on the English case of Entick v. Carrington, 19 How. St. Tr. 1029, *reprinted in* [1558-1774] All E.R. Rep. 41 (C.P. 1765). The Court in *Entick* held that an English secretary of state did not have jurisdiction to grant a warrant for the search and seizure of libelous papers. *Id.* at 1029, [1558-1774] All E.R. Rep. at 46.

[19] 116 U.S. at 624-25, 634-35. In *Boyd*, the Court held that a certain invoice, seized under a warrant and introduced into evidence by the government in an action against an importer for nonpayment of customs duties, was obtained in violation of the reasonableness clause of the fourth amendment and the self incrimination clause of the fifth amendment. *Id.* at 634-35. The self incrimination clause of the fifth amendment provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. CONST. amend. V.

[20] 232 U.S. 383 (1914).

[21] *Id.* at 398. In *Weeks*, the appellant was convicted for violation of a federal law that prohibited use of the mail for transportation of lottery tickets. The government introduced evidence obtained in a warrantless search of appellant's home. State officials and a federal marshal, independent of one another, conducted warrantless searches. *Id.* at 386. Although the Court excluded the evidence obtained by the federal marshal, the evidence turned over to the federal government by the state was admitted since the fourth amendment was not directed to conduct by state officials. *Id.* at 398. This practice became known as the "silver platter" doctrine which was later overruled in Elkins v. United States, 364 U.S. 206 (1960).

In Mapp v. Ohio, 367 U.S. 643 (1961), the Court, applying the exclusionary rule to state criminal proceedings through the due process clause of the fourteenth amendment, held that products of an unconstitutional search and seizure were inadmissible. *Id.* at 655. This decision overruled Wolf v. Colorado, 338 U.S. 25 (1949), which held that the exclusionary rule does not apply to the states. *Id.* at 28-33. Mississippi, however, adopted the exclusionary rule of *Weeks* in state criminal trials prior to the *Mapp* decision. Tucker v. State, 128 Miss. 211, 224, 90 So. 845, 848 (1922).

[22] 232 U.S. at 393.

[23] *See* Gouled v. United States, 255 U.S. 298, 301 (1921) (government has duty to secure evidence without violation of constitutional rights of accused); Weeks v. United States, 232 U.S. 383, 398 (1914) ("denial of constitutional rights of the accused"); *cf.* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920) (corporation pro-

the doctrine that search and seizure rights were dependent on property interests without consideration of policy interests culminated in the case of *Gouled v. United States*.[24] In *Gouled*, the Court held that property seized merely for evidentiary purposes was not admissible at trial since the government could not assert any interest in the property.[25] The principles announced in *Boyd, Weeks,* and *Gouled* furnished the foundation for constitutional protection of individual privacy. With the exceptions of search incident to arrest[26] and search of vehicles if a warrant could not be obtained before the evidence was moved out of the locality,[27] no search could be made absent compliance with the warrant clause of the fourth amendment.

Indications of divergence from the property interest approach to the fourth amendment privacy doctrine surfaced in the dissenting opinions of *Olmstead v. United States*.[28] Justices Holmes and Brandeis rejected the property interest doctrine and evaluated what they perceived as competing interests between personal privacy and law enforcement.[29] In a brief dissent, Justice Holmes balanced the interest in adequate crime detection with the interest in the prohibition against unconstitutionally obtained evidence,[30] concluding that evidence obtained through governmental wiretaps should be excluded since, in his view, it was far less evil for a criminal to escape than for the government to play an "ignoble" part.[31] Justice Brandeis dissented on

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tected by fourth amendment).

[24] 255 U.S. 298 (1921). For a discussion of the doctrine as applied in *Boyd, Weeks,* and *Gouled* see Note, *Formalism, Legal Realism, and Constitutionally Protected Privacy Under the Fourth and Fifth Amendments*, 90 HARV. L. REV. 945, 951-64 (1977).

[25] 255 U.S. at 308-09. In *Gouled,* the appellant was charged with conspiring to defraud the government and was convicted on evidence obtained secretly by a governmental agent under false pretenses. *Id.* at 302-03. The Court reversed the conviction and held that evidence obtained by a governmental agent through "stealth, or through social acquaintance, or in the guise of a business call" violated the fourth amendment and required exclusion. *Id.* at 306.

[26] Weeks v. United States, 232 U.S. 383, 392 (1914).

[27] Carroll v. United States, 267 U.S. 132, 153-54 (1925). *Carroll* held that governmental agents had the right to search an automobile for illegal liquor if the officer had probable cause to believe that contraband liquor was being transported in it. *Id.* at 155.

[28] 277 U.S. 438 (1928). The majority in *Olmstead* reasoned that there was not a property interest in an intangible telephone conversation and that the fourth amendment protected material things only. Therefore, wiretaps authorized by governmental agents did not amount to a search and seizure of items protected by the fourth amendment. *Id.* at 464.

[29] *See* text accompanying notes 30 through 33 *infra.*

[30] 277 U.S. at 470-71 (Holmes, J., dissenting).

[31] *Id.*

grounds that all unjustifiable governmental intrustions upon individual privacy constitute fourth amendment violations.[32] He emphasized that personal privacy rather than property should be the principal value underlying fourth amendment guarantees since advanced technology had provided more far-reaching means of invading privacy.[33] In *Warden v. Hayden*,[34] the Supreme Court rejected the premise that property interests control search and seizure rights and discredited the "mere-evidence" rule of *Gouled*.[35] In *Katz v. United States*,[36] the Court overruled *Olmstead* and held that electronic surveillance by the government of a phone booth constituted a search and seizure within the protection of the fourth amendment.[37] Following the reasoning of Justice Brandeis in his *Olmstead* dissent,[38] the Court remarked that the fourth amendment protects people rather than places.[39] The dereliction of property interest analysis of fourth amendment protection created a demand for a new standard to assess the reasonableness of searches and seizures, and the dissents in *Olmstead* laid the foundation for the development of that new standard.[40]

In *Terry v. Ohio*,[41] the Court was called upon to determine the reasonableness of a street detention and weapons search or "stop and frisk" of a person by police.[42] Weighing the governmental interest

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[32] *Id.* at 478 (Brandeis, J., dissenting).

[33] *Id.* at 473.

[34] 387 U.S. 294 (1967).

[35] *Id.* at 306. The *Hayden* Court held that certain articles of clothing, worn by an accused armed robber and seized from his home pursuant to a warrant, were properly admitted into evidence. *Id.* at 307.

[36] 389 U.S. 347 (1967).

[37] *Id.* at 353.

[38] *See* notes 32, 33 and accompanying text *supra*.

[39] 389 U.S. at 351. The Court declared, "[w]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." *Id.* at 359.

[40] *See* text accompanying notes 29 through 33 *supra*.

[41] 392 U.S. 1 (1968). Companion cases to *Terry* are Sibron v. New York and Peters v. New York, 392 U.S. 40 (1968). These cases addressed basically the same issue that *Terry* did. *Id.* at 43. *Sibron* held that a police detective made an unlawful search of the defendant whom he had observed whispering to several known narcotics addicts. The search was unlawful because the officer was seeking narcotics rather than weapons. *Id.* at 63-65. *Peters*, on the other hand, held that certain burglar's tools were the products of a valid search because the officer had probable cause to arrest. *Id.* at 66-67. For discussion of the foregoing cases see LaFave, *"Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond*, 67 MICH. L. REV. 40, 47-59 (1968).

[42] 392 U.S. at 20-21. The term stop and frisk is commonly used as a convenient way of describing certain limited intrusions on persons which do not amount to the more serious intrusion of an arrest accompanied by a search for weapons and evidence. *See* 3 W. LAFAVE, SEARCH AND SEIZURE 10 (1978) (discussion of use of term stop and frisk).

against the individual's constitutional right to be free from unreasonable search and seizure,[43] the Court held that where there is a reasonable suspicion that an individual is armed and dangerous, the fourth amendment permits a police officer to make a limited search of the suspect's outer clothing for weapons.[44] The Court reasoned that where a policeman accosts an individual and restrains his freedom to walk away, the person has been seized within the meaning of the fourth amendment; thus seizure is not limited to arrest.[45] The Court emphasized that where an officer conducts a stop and frisk, he must articulate the specific facts and rational inferences drawn from those facts which warrant the intrusion; such facts, the Court held, must be judged against an objective standard.[46] Although the Court refused to comment on the constitutionality of a forcible stop instigated upon less than probable cause for mere purposes of questioning,[47] the Court did acknowledge that in a stop and frisk, seizure of the person occurred at some time prior to the weapons frisk.[48] In a concurring opinion, Justice Harlan urged that it was first necessary to decide whether the officer had constitutional grounds to make the forcible stop before determining the legality of the subsequent frisk.[49] *Terry* was the first Supreme Court case to consider whether police have the right to stop and ques-

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[43] 392 U.S. at 21. The application of the balancing test to determine the reasonableness of a search and seizure was initiated in Camara v. Municipal Court, 387 U.S. 523 (1967). In *Camara*, the Court stated that there is "no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails." *Id.* at 536-37. The *Camara* Court held that individuals have a right to demand a search warrant for nonemergency administrative inspections; however, an administrative warrant may issue on the reasonable belief that there is a violation. *Id.* at 534-40. *See* See v. City of Seattle, 387 U.S. 541, 542-46 (1967) (balancing test applied to determine whether to issue warrant for administrative inspection of commercial premises).

[44] 392 U.S. at 30-31. In *Terry*, a police detective observed three men engaged in what he suspected to be a reconnaissance of a particular store in preparation for a robbery. The detective followed the men, identified himself, and asked their names. When he received an indiscernible response, he apprehended and frisked the petitioner, Terry. The detective discovered a revolver and arrested the men. Petitioner was convicted of carrying a concealed weapon. *Id.* at 6-8.

[45] *Id.* at 16. Note that the fourth amendment expressly prohibits unreasonable seizures of the person. See note 15 *supra*.

[46] 392 U.S. at 21.

[47] *Id.* at 19 n.16.

[48] *Id.* at 19.

[49] *Id.* at 32-33 (Harlan, J., concurring). Many commentators following the *Terry* decision were in agreement with the Harlan view. *See, e.g.*, LaFave, *supra* note 41, at 63-64 (*Terry* would have been better decided if the Harlan view had been applied); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 181-82 (1968) (same); 10 ARIZ. L. REV. 423, 424-25 (1968) (same).

tion an individual without his consent or without probable cause to arrest.[50] Arrest without a warrant has traditionally required probable cause.[51] Probable cause has been defined as the facts and circumstances known to the officer that would justify a prudent man in concluding that an offense had been committed.[52] *Terry* authorizes police officers to stop and frisk individuals suspected of criminal activity although the officers lack probable cause to arrest. In *Davis v. Mississippi*,[53] local police, acting without probable cause, detained a person for the purpose of taking his fingerprints. The Court held that detention for the mere purpose of taking fingerprints was an unreasonable seizure in violation of the fourth amendment.[54] Taken together, *Davis* and *Terry* clearly indicate that the fourth amendment applies to all seizures, including those entailing only brief periods of detention not rising to the level of an arrest.[55]

Adams v. Williams[56] produced the next significant application by the Supreme Court of the *Terry* principles to the stop and frisk issue. In *Adams*, the Court rejected the argument that grounds for a stop and frisk could be based only on personal observations of the officer.[57] In-

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[50] The Court avoided the issue on at least two prior occasions. *See* Rios v. United States, 364 U.S. 253, 260-62 (1960) (heroin dropped on floor during investigatory stop); Henry v. United States, 361 U.S. 98, 99-104 (1959) (stolen radios discovered during investigatory stop).

[51] *E.g.*, Wong Sun v. United States, 371 U.S. 471, 480 (1965); Henry v. United States, 361 U.S. 98, 102 (1959); McDonald v. United States, 335 U.S. 451, 455-56 (1949); Johnson v. United States, 333 U.S. 10, 13-15 (1948); Carroll v. United States, 267 U.S. 132, 156 (1925).

[52] *E.g.*, Henry v. United States, 361 U.S. 98, 102 (1959); Stacy v. Emery, 97 U.S. 642, 645 (1879).

[53] 394 U.S. 721, 723 (1969). Fingerprints were taken and the person was released. When the fingerprints subsequently were matched with those taken from a rape victim's home, the person was arrested. A rape conviction followed the arrest. *Id.* at 722-23.

[54] *Id.* at 728. The conviction was reversed by the Supreme Court. *Id.* The Court remarked that there is no exception to the rule that illegally seized evidence is not admissible at trial, regardless of the trustworthiness of the evidence as an item of proof. *Id.* at 724.

[55] *Id.* at 726-27; Terry v. Ohio, 392 U.S. 1, 16-19 (1968). In *Davis*, however, the Court stated in a footnote that it is a well settled principle that police have the right to request citizens to answer questions concerning unsolved crimes, but that there exists no right to compel an answer. 394 U.S. at 727 n.6. *Accord*, Terry v. Ohio, 392 U.S. 1, 34 (1968) (White, J., concurring) (person detained in investigative stop cannot be compelled to answer and refusal to answer furnishes no grounds for arrest). *Cf.* Miranda v. Arizona, 384 U.S. 436, 476-77 (1966) (dictum) (cannot be compelled to answer when deprived of freedom of action in any significant way).

[56] 407 U.S. 143 (1972).

[57] *Id.* at 147. In *Adams*, a police officer received a tip from one of his regular infor-

stead, the Court held that information supplied by an informant could be relied upon when the information bears "indicia of reliability" sufficient to give an officer the reasonable suspicion necessary for a stop and frisk.[58] *Adams* expanded *Terry* by broadening the scope of the reasonable grounds necessary to justify a stop and frisk,[59] but, like *Terry*, it failed to determine whether or not the police have authority merely to stop and question on less than probable cause.[60]

In *Norwell v. Cincinnati*,[61] the Court reversed a disorderly conduct conviction of a man who had been arrested for refusing to respond to a policeman's inquiry.[62] In a per curiam opinion the Court held that a person may not be punished for objecting to questionable detention by the police.[63] In *United States v. Brignoni-Ponce*,[64] however, the Court reasoned that *Adams* and *Terry* taken together had established that in appropriate circumstances the fourth amendment permits limited search or seizure on less than probable cause for arrest or search.[65] Balancing the governmental interest in the prevention of

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mants that there was a man in a nearby car who was carrying narcotics and had a gun in his waistband. When the officer approached the car and asked the occupant to get out, the man lowered the window. At that point the officer reached inside the car and removed a loaded revolver from the occupant's waistband. The occupant was then arrested and the incidental search produced a quantity of heroin. *Id.* at 144-45.

[58] *Id.* at 147. In *Adams*, the Court affirmed the appellant's conviction and held that under the circumstances the holding in *Terry* justified seizing the revolver and that the heroin had been lawfully obtained in the search incident to the arrest. *Id.* at 151-53.

[59] Justice Douglas, joined by Justice Marshall, dissented and argued that *Terry* should not be extended to mere possessory offenses, especially when the grounds for the stop and frisk are not based on personal observations. *Id.* at 151. In a separate dissent, Justice Brennan objected to the extension on the same grounds. *Id.* at 152-53.

[60] The *Adams* Court referred to dictim in *Terry* concerning this point: "a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is not probable cause to make an arrest." *Id.* at 145 (quoting Terry v. Ohio, 392 U.S. at 22). "A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of facts known to the officer at the time." 407 U.S. at 146 (citing Terry v. Ohio, 392 U.S. at 21-22). At least three commentators have criticized the *Adams* opinion for not answering the questions raised by *Terry*. 3 W. LAFAVE, *supra* note 42, at 64-66; Caracappa, *Criminal Law and Criminal Procedure: Some Current Issues*, 16 DUQ. L. REV. 499, 505-07 (1978); 50 DEN. L.J. 243, 246-50 (1973). For a comment on the impact of *Terry* and *Adams* on Mississippi law see Comment, *Stop And Frisk In Mississippi: Is It Legal? Should It Be? A Comment On Keys v. State*, 45 MISS. L.J. 763 (1974).

[61] 414 U.S. 14 (1973) (per curiam).

[62] *Id.* at 15.

[63] *Id.* at 16.

[64] 422 U.S. 873 (1975).

[65] *Id.* at 880-81.

illegal immigration against the intrusion of a brief stop, the Court held that if an officer's observations lead him reasonably to suspect that a particular vehicle contains illegal aliens, he may stop the car momentarily to investigate the circumstances that aroused his suspicion.[66] Nevertheless, the Court concluded that random stops of vehicles were unreasonable and the fact that the vehicle's passengers appeared to be of Mexican ancestry did not furnish a reasonable basis for a suspicion that the vehicle contained illegal aliens.[67] The balancing test was again applied in *Pennsylvania v. Mimms*[68] to affirm a conviction for carrying a concealed weapon.[69] In *Mimms*, a police officer stopped an automobile to issue a traffic citation and ordered the driver to get out of the vehicle.[70] When the officer observed a large bulge under the driver's jacket, he searched the man and discovered a gun.[71] The Court found that the public interest in the officer's personal safety outweighed the minimal violation of the driver's privacy occasioned by the order to get out of the car.[72] Since the order to get out of the car was permissible, the Court held that the officer had a reasonable suspicion to frisk for weapons once he had seen the gun.[73]

In *Delaware v. Prouse*,[74] the Court applied *Brignoni-Ponce* to determine whether or not police officers have the right to stop an automobile at random for the purpose of checking the driver's license.[75] While it agreed that the purpose of such stops was limited and the resulting detention brief, the Court determined that the stopping of an

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[66] *Id.* at 881-82.

[67] *Id.* at 882, 885-86. The *Brignoni-Ponce* Court distinguished Almeida-Sanchez v. United States, 413 U.S. 266 (1973), noting that in *Brignoni-Ponce* the border patrol wanted only to question occupants about their immigration status, while in *Almeida-Sanchez* they wanted to search the cars. 422 U.S. at 874. In *Almeida-Sanchez*, the Court held that the fourth amendment requires probable cause as a minimum before a car can be searched. 413 U.S. at 270. *See also* United States v. Martinez-Fuerte, 428 U.S. 543, 562 (1976) (stops and questioning may be made without individualized suspicion at reasonably located border check points).

[68] 434 U.S. 106 (1977) (per curiam).

[69] *Id.* at 109.

[70] *Id.* at 107.

[71] *Id.*

[72] *Id.* at 110-11.

[73] *Id.* at 111-12.

[74] 99 S. Ct. 1391 (1979).

[75] *Id.* at 1396-1400. In *Prouse*, an officer stopped the respondent for a license check and smelled marijuana as he approached the vehicle. After the officer observed a package of marijuana on the floor of the vehicle he arrested the driver. *Id.* The trial court granted respondent's motion to suppress the evidence on the grounds that arbitrary stops violated the fourth amendment. *Id.*

automobile was nevertheless a seizure within the scope of the fourth amendment.[76] Balancing the governmental interest in the marginal contribution of random stops to road safety against the probability of discretionary abuse by police officers at the expense of the privacy of drivers,[77] the Court held that a reasonable suspicion of a traffic violation or criminal activity by the driver was necessary to warrant an intrusion upon the privacy of individuals using the public roads.[78] The imposition of standards of reasonableness upon the exercise of discretion by police for the protection of the privacy and security of individuals, the Court stated, is the essential purpose of the fourth amendment.[79]

Despite the extension of the "reasonable suspicion" standard in cases subsequent to *Terry*, the Court refused to apply the standard to support custodial interrogations in *Dunaway v. New York*.[80] Relying on *Davis v. Mississippi*,[81] the Court held that the traditional standard of probable cause was required before the police could take a suspect to the station house for questioning without his consent.[82] In *Michigan v. DeFillippo*,[83] the respondent had been taken into custody for violation of a city ordinance which made it unlawful to refuse identification when a police officer had reasonable cause to believe that an individual's behavior warranted further investigation.[84] While he was in police

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[76] *Id.* at 1396 (citing United States v. Martinez-Fuerte, 428 U.S. 543, 556-58 (1976) and United States v. Brignoni-Ponce, 422 U.S. 873, 878 (1975)).

[77] 99 S. Ct. at 1400.

[78] *Id.* at 1400-01. The Court acknowledged that to use road blocks was a permissible alternative to random stops at patrolmen's discretion. *Id.* at 1401. *Accord,* Miller v. State, 373 So. 2d 1004 (Miss. 1979).

[79] *Id.* at 1396. *See* Marshall v. Barlow's Inc., 436 U.S. 307, 312 (1978) (warrant required before OSHA inspectors can enter business premises); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (warrant required for search of home by city inspectors).

[80] 99 S. Ct. 2248, 2258 (1979). In *Dunaway,* the petitioner was taken into custody and interrogated without being placed under arrest. He made statements and drew sketches that implicated him in an attempted robbery and felony murder. *Id.* at 2251. The prosecution conceded that there was not probable cause to take the petitioner in for interrogation. *Id.* at 2253. He was convicted by a jury on evidence obtained during the interrogation. *Id.* at 2251.

[81] 394 U.S. 721 (1969). *See* notes 53 through 55 and accompanying text *supra.*

[82] 99 S. Ct. at 2258. The Court reversed petitioner's conviction since no intervening events separated the illegal detention from the incriminating statements. *Id.* at 2260. The Court used the "causal connection" test established in Brown v. Illinois, 422 U.S. 590 (1975), which required consideration of the proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Id.* at 603-04.

[83] 99 S. Ct. 2627 (1979).

[84] *Id.* at 2630. In *DeFillippo,* Detroit police received a call to investigate two persons

custody, a search uncovered certain drugs and the respondent was charged with possession.[85] A state appellate court subsequently held that the ordinance was unconstitutional and remanded the case with instructions to suppress evidence of the possession charge.[86] On certiorari, the United States Supreme Court found that when the respondent was arrested, the policemen had probable cause to believe that the ordinance had been violated.[87] The Court noted that since police officers have a duty to enforce the laws unless they are obviously unconstitutional, an arrest pursuant to the ordinance was lawful.[88] The Court concluded, then, that an arrest made in good faith under a presumptively valid ordinance subsequently declared unconstitutional was a valid arrest.[89] The Court reasoned that because the officers had probable cause to arrest, the evidence should not have been suppressed[90] since evidence discovered in a search incident to a valid arrest is admissible.[91] The Court ruled that the deterrence of officers from enforcing a presumptively valid ordinance was not within the purpose of the

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who appeared to be intoxicated in an alley. The policemen who received the call found respondent and a woman in the alley. Seeing the woman lowering her pants, the policemen asked for identification and an explanation. The respondent asserted that he was a policeman but later changed his answer and said he worked for a certain policeman. The woman stated that she was about to relieve herself. When the respondent failed to provide identification, he was taken into custody and searched. *Id.* Respondent was not charged for violation of the city ordinance. *Id.* at 2631.

[85] *Id.* at 2630. Marijuana and another controlled substance, phencyclidine, were found. Respondent was charged with possession of the latter. *Id.*

[86] *Id.* at 2631.

[87] *Id.* at 2632.

[88] *Id.*

[89] *Id.* at 2632-33. The Court distinguished *DeFillippo* from other cases which required supression of evidence obtained in searches carried out pursuant to statutes, not previously declared unconstitutional, which purported to authorize the searches in question without probable cause. *Id.* at 2633. *See, e.g.,* Torres v. Puerto Rico, 99 S. Ct. 2425, 2431 (1979) (evidence obtained pursuant to statute allowing search of overseas traveler's baggage on less than probable cause held not admissible); Almeida-Sanchez v. United States, 413 U.S. 266, 268-70 (1973) (evidence obtained pursuant to federal statute and regulations allowing search of any vehicle within 100 miles of border on less than probable cause held not admissible); Berger v. New York, 388 U.S. 41, 55-56 (1967) (statute authorizing search under warrants which did not particularly describe the place or thing to be seized held unconstitutional and evidence obtained pursuant to statute inadmissible). The Court noted that those decisions authorized searches under circumstances which did not satisfy probable cause requirements. 99 S. Ct. at 2633. In contrast, the Court explained, the ordinance in *DeFillippo* allowed arrest and search only under facts and circumstances which constituted probable cause. *Id.*

[90] 99 S. Ct. at 2633 n.3.

[91] *Id.* at 2631. *See* United States v. Robinson, 414 U.S. 218, 235 (1973).

exclusionary rule;[92] the purpose of the rule, according to the Court, was to deter only unlawful police conduct.

In the instant case, a unanimous Court reasoned that restraint of an individual's freedom in order to obtain identification is a seizure within the meaning of the fourth amendment.[93] Since the fourth amendment requires that all seizures of the person be reasonable,[94] the Court stated that a test to determine reasonableness is essential.[95] The "reasonableness" of the seizure, stated the Court, must be determined by balancing the constitutionally protected interest in the individual's right to be free from arbitrary interference by police officers against the legitimate interest of the government in a seizure based upon specific and objective facts.[96] The Court concluded that the balance of these interests preponderated in favor of the individual[97] since the state could not articulate any specific objective facts which could support a reasonable suspicion of criminal activity,[98] and since the mere presence of an individual in an area with a high incidence of drug traffic was insufficient to imply criminal activity.[99]

One effect of the instant case is to eliminate existing confusion as to the minimum standard necessary to support a detention and street investigation. When the recent search and seizure precedents[100] are considered in light of the decision in the instant case, it is clear that the minimum standard is reasonable suspicion and that the reasonableness of the seizure is to be tested by balancing the interests of the adverse parties in each case. In the instant case, the interests of the state in crime prevention and detection were weighed against the individual's interest in being free to walk the streets without arbitrary interference by the police.[101]

The balancing of adverse interests in search and seizure cases is not unlike the cost-benefit analysis employed in economic decision-making.[102] The private marginal costs of the intrusion on individual

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[92] 99 S. Ct. at 2633 n.3.

[93] Brown v. Texas, 99 S. Ct. 2637, 2640 (1979).

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.* at 2641.

[98] *Id.*

[99] *Id.*

[100] *See* notes 41 through 52, 56 through 60, 64 through 82 and accompanying text *supra.*

[101] 99 S. Ct. at 2640.

[102] *See generally* R. POSNER, ECONOMIC ANALYSIS OF LAW 3-14 (1977) (fundamental concepts of economic analysis).

freedoms are weighed against the expected marginal benefit to society. If costs are greater than the benefits, the seizure is unreasonable. Conversely, if the social benefit is greater, the seizure is reasonable under the balancing test. The outcome is dependent on the selection and description of the interests that are being weighed.

In the fourth amendment context the Court has applied the reasonable suspicion standard to the areas of police field investigation[103] and administrative search warrants.[104] Both of these areas involve the interests of government or society on one side of the scale and the individual's interest in privacy and freedom on the other side. History has shown that the interests of society and government have a tendency to change and often appear to conflict. However, the basic ideals of privacy and freedom are constant and inherent.[105] Thus, as the various interests of society change, the relative importance of those interests will change accordingly. Since the standard of reasonable suspicion depends on the importance attached to a given interest, it follows that what is a reasonable suspicion in one instance will be deemed unreasonable in another. Therefore, the Court has adopted a variable standard which, it is assumed, will progress with the interests of society. If the ultimate goal of the law is to maximize social welfare, there will be an expansion of the reasonable suspicion standard into other areas of search and seizure law. Indeed, the development of search and seizure law in the modern era has shown a withering away of the traditional standard of probable cause.[106]

On the other hand, if it is assumed that the ultimate goal of fourth amendment law is the protection of privacy, it follows that a variable standard does not promote this interest because the individual interests of privacy and freedom are constant. There are certain problems that may arise with respect to the reasonable suspicion standard because it is variable and is in the nature of a sliding-scale approach. Each time the Court agrees to decide a search and seizure case in which the reasonable suspicion standard applies, it will be necessary to balance the interests of the parties in each particular case on the scales

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[103] Delaware v. Prouse, 99 S. Ct. 1391, 1401 (1979); Terry v. Ohio, 392 U.S. 1, 15-16 (1968).

[104] Camara v. Municipal Court, 387 U.S. 523, 534-40 (1967).

[105] *Compare* Boyd v. United States, 116 U.S. 616, 624-30 (1886) (strong interest in individual privacy and freedom) *with* Camara v. Municipal Court, 387 U.S. 523, 530-40 (1967) (same).

[106] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (stop and frisk on less than probable cause); See v. City of Seattle, 387 U.S. 541, 544-46 (1967) (warrant for administrative inspection on less than probable cause).

of justice. Problems may arise because the Justices place additional weight on the scale according to their personal, social, and economic theories.[107]

Another problem may arise because of the discretion of the Justices with respect to the decision of whether to apply the reasonable suspicion standard. In *Michigan v. DeFillippo*,[108] the majority refused to apply this standard to a situation similar to that of the instant case. The reasonable suspicion standard was applied in the instant case as an alternative to deciding whether the Texas statute was constitutional.[109] On the basis of the facts in the instant case, the state did not have a chance to win because the appellant had not done any act in which the state could assert an interest.[110] If the Court had passed on the validity of the Texas statute and had held it valid, then the appellant nevertheless would have prevailed because his actions did not give rise to a lawful stop. Thus, the Court would have had to balance the interests anyway. If the Court had found the statute unconstitutional, the instant case would then have to be squared with *DeFillippo*.[111] If *DeFillippo* had applied, then the appellant would have won the battle but lost the war[112] since an arrest pursuant to a presumptively valid statute is lawful under *DeFillippo*.

At least one valid inference may be drawn from the instant case:

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[107] Note the reluctance of certain members of the Burger Court to reverse criminal convictions. *See, e.g.*, Michigan v. DeFillippo, 99 S. Ct. 2627, 2631-33 (1979) (evidence should not be suppressed even though obtained under unconstitutional ordinance); Gustafson v. Florida, 414 U.S. 260, 266 (1973) (search incident to valid arrest needs no additional justification even though the type of arrest did not require arrestee to be taken into custody). *See also* Bivens v. Six Unknown Named Agents, 403 U.S. 388, 413-24 (1971) (Burger, C.J., dissenting) (tracing criticisms and weaknesses of exclusionary rule).

[108] 99 S. Ct. 2627 (1979). *Compare* notes 2 through 4 and accompanying text *supra with* notes 84 through 88 and accompanying text *supra*.

[109] Brown v. Texas, 99 S. Ct. 2637, 2640-41 (1979). "We need not decide whether an individual may be punished for refusing to identify himself in the context of a lawful investigatory stop which satisfies Fourth Amendment requirements." *Id.* at 2641 n.3.

[110] *Id.* at 2641-42 app. *See* notes 2 through 4 and accompanying text *supra*.

[111] The two cases may, however, be distinguished on their facts. The respondent's conduct in *DeFillippo* was probably sufficient to excite a reasonable suspicion of criminal activity since there was a complaint made and a false identification given. Michigan v. DeFillippo, 99 S. Ct. at 2630; *see* notes 84 through 88 and accompanying text *supra*. The appellant in *Brown*, however, had not done any act to excite a reasonable suspicion. *See* notes 2 through 4 and accompanying text *supra*. Furthermore, the search incident to the arrest in *Brown* uncovered nothing illegal, see note 4 *supra*, but the search of the respondent in *DeFillippo* uncovered two controlled substances. *See* note 86 and accompanying text *supra*.

[112] *See* notes 83 through 92, 111 and accompanying text *supra*.

where the prospective detainee has done nothing to attract suspicion, he cannot be subjected to a street investigation and has the liberty to ignore the police officer.[113] Assuming that the Texas statute is constitutional and that the lawfulness of the stop depends upon a reasonable suspicion,[114] it follows that the police officer has the power to transform a reasonable suspicion of criminal activity into probable cause for arrest by means of the statute. This can occur when a policeman has a reasonable suspicion that a person is engaged in criminal activity. If the officer accosts the individual and demands identification which the individual refuses to provide, the officer has grounds for arrest and evidence discovered in the subsequent search is admissible.[115] The only remaining element necessary is incriminating evidence. This would produce an arrest on less than probable cause and a search of the person where there were no grounds to believe that the person was armed and dangerous. This point was expressed by Justice Brennan's dissent in *DeFillippo*:[116] a major constitutional defect in that statute was that it forced individuals accosted by police on the basis of suspicion to choose between the right to remain silent and their right not to be searched.[117] For these reasons, it is contended that the Court will have to decide the validity of a similar statute at some time in the future.

Charles I. Knauss, Jr.

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[113] *Accord,* Norwell v. Cincinnati, 414 U.S. 14, 16 (1973) (per curiam) (detainee may object to unreasonable detention).

[114] That the Court made these assumptions may be inferred from a reading of the opinion. *See* 99 S. Ct. at 2640-41.

[115] *See, e.g.,* United States v. Robinson, 414 U.S. 218, 235 (1973) (search incident to lawful arrest authorized).

[116] Michigan v. DeFillippo, 99 S. Ct. at 2636-37 (Brennan, J., dissenting).

[117] *Id.*

Patent Law—Federal Patent Policy Does Not Preclude Enforcement of Royalty Contract for Unpatented Device

The Quick Point Pencil Company[1] brought an action in the District Court for the Eastern District of Missouri[2] seeking a declaratory judgment[3] that its royalty contract for the manufacture of Aronson's invention[4] was enforceable.[5] Quick Point had agreed to pay Aronson either five per cent sales royalties if the invention became patented[6] or two and one half per cent royalties in the event no patent issued.[7] The district court upheld the contract, accepting Aronson's position that the unequivocal language of the agreement was controlling.[8] The Court of Appeals for the Eighth Circuit reversed, sustaining Quick Point's contention that payment of royalties for an unpatented invention ran contrary to federal patent policy.[9] On writ of certiorari the United States Supreme Court, *held,* reversed. Federal patent law does not preempt state contract law so as to render unenforceable a royalty contract in which the licensed manufacturer agrees to continue paying royalties even in the event no patent issues. *Aronson v. Quick Point Pencil Co.*, 99 S. Ct. 1096 (1979).

Historically, the American inventor has been able to utilize either

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[1] Plaintiff, Quick Point Pencil Co., a Missouri corporation, is a manufacturer of products for the advertising specialty industry. Quick Point Pencil Co. v. Aronson, 425 F. Supp. 600, 601 (E.D. Mo. 1976), *rev'd,* 567 F.2d 757, 760 (8th Cir. 1977), *rev'd,* 99 S. Ct. 1096, 1101 (1979).

[2] Jurisdiction was based on diversity of citizenship under 28 U.S.C. § 1332 (1976). 425 F. Supp. 600, 602 (E.D. Mo. 1976).

[3] 28 U.S.C. § 2201 (1976).

[4] Defendant, Aronson, a resident of Illinois, had invented a keyholder. 425 F. Supp. at 601.

[5] *Id.* at 601-02.

[6] The agreement was entered into while Aronson's patent application was pending. Aronson's patent application, No. 542,677, was filed with the United States Patent Office on October 25, 1955. The licensing contract was entered into on June 26, 1956 and amended on June 27, 1956. *Id.* at 601.

[7] The contract gave Quick Point the exclusive right to manufacture and market the keyholders. The 5% royalty rate was to be paid for five years (until June 1961), and thereafter if a patent issued. If after five years no patent had issued, the royalty rate was to be reduced to 2½%, payable as long as Quick Point continued to market the keyholder. In fact, the patent did not issue during the initial five year period and Quick Point thereafter paid a royalty of 2½% on its total sales of the keyholder until September 1975. Over this nineteen year period Quick Point paid in excess of $200,000 to Aronson under the contract. *Id.*

[8] *Id.* at 602.

[9] Quick Point Pencil Co. v. Aronson, 567 F.2d 757, 760-62 (8th Cir. 1977), *rev'd*, 99 S. Ct. 1096 (1979).

of two separate systems of legal protection by which he could prevent others from exploiting his discovery.[10] The system affording the greatest protection is the federal patent system[11] created by the United States Constitution[12] and developed according to a statutory scheme.[13] Following ratification of the Constitution, the legal structure of the patent system was established by the Letters Patent Act of 1790.[14] The

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[10] 20 VILL. L. REV. 225, 227 (1974) (American inventor has enjoyed a dual system of protection).

[11] *Id.*

[12] U.S. CONST. art. I, § 8, cl. 8 provides that Congress shall have the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."

[13] 35 U.S.C. §§ 1-294 (1976).

[14] Letters Patent Act of 1790, 1 Stat. 109. The origin of this statutory protection is found in the European Renaissance. B. BUGBEE, GENESIS OF AMERICAN PATENT AND COPYRIGHT LAW 12-56 (1967). At that time the governments of various European countries tried to stimulate their nations' economies by granting trade monopolies to individual companies engaged in sundry enterprises. E. PENROSE, THE ECONOMICS OF THE INTERNATIONAL PATENT SYSTEM 2-10 (1951). Somewhat later these same governments began to stimulate inventions by likewise giving inventors the exclusive right to exploit their discoveries. B. BUGBEE, *supra* at 17. June 19, 1421, was the probable date upon which the earliest true patent of invention was issued. *Id.* The Republic of Florence, Italy, by private statute rewarded Fillippo Brunelleschi with a monopoly over a new kind of cargo ship. The patent recognized the inventor's inherent rights in his invention, the contractual quid pro quo (monopoly in exchange for disclosure) of patent protection, and the benefit accruing to society from the stimulation of invention. Thus, the fundamental principles underlying intellectual property and its protection were set forth in this first patent. Ironically, Brunelleschi's boat apparently sank a short while later. *Id.* at 18-19.

In England, beginning with the reign of Queen Elizabeth I in 1559, trade monopolies were created by the Crown's issuance of "letters patent." *Id.* at 42. Inventors' monopolies were created by "letters patent for invention." Note, *Patent Law—Patent Validity: The Public is the Third Party*, 51 DEN. L.J. 95, 98-108 (1974). In time, the abuses associated with trade monopolies aroused public hostility, *id.* at 97-100, and resulted in eventual enactment of the Statute of Monopolies in 1623. Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 6. The Statute was actually an outgrowth of the Case of Monopolies, Darcy v. Allen, 1 Web. Pat. Cases 1, Noy 173, Moore K.B. 671, 11 Co. Rep. 846 (1602). This case held that a trade monopoly was invalid if (1) it prevented a craftsman from carrying on his trade; (2) it raised the price of a commodity; or (3) the Crown was deceived or mistaken in granting the patent. Note, *supra*, at 99. Later, in the Cloth Workers of Ipswich Case, Godbolt 252, 1 Abb. Pat. Cases 6 (1615) letters patent for invention were held not contrary to law or harmful to trade. B. BUGBEE, *supra*, at 38. Though the Statute declared all monopolies void, it expressly saved letters patent for invention as an exception.

Reflecting the prior holdings in *Darcy v. Allen* and the *Cloth Workers Case*, the Statute provided that all monopolies "for the sole buying, selling, making, working or using of any thing within this Realm" were contrary to the law and void. Following the rule in *Darcy v. Allen*, the Statute declared that the validity of all monopolies and letters patent would be determined by common law principles. B. BUGBEE, *supra*, at 38-39. This exception for letters patent was made in § 6:

Act, based in large measure on the colonial experience,[15] provided that inventors could secure a fourteen year monopoly for new and useful inventions.[16] Since the enactment of the Act of 1790, the controlling

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> [A]ny declaration before mentioned shall not extend to any letters patent and grants of privilege for the term of fourteen years or under, thereafter to be made of the sole working or making of any manner of new manufactures within this Realm, to the true and first inventor and inventors of such manufactures, which others at the time of making such letters patents and grants shall not use, so as also they be not contrary to the law, nor mischievous to the State, by raising prices of commodities at home, or hurt of trade, or generally inconvenient . . . .

Statute of Monopolies, 1623, 21 Jac. 1, c. 3, § 6, *quoted in* E. PENROSE, *supra* at 7. *See also* 8 A. DELLER, WALKER ON PATENTS § 634 (2d ed. 1973) (historical background: patent and common law monopolies contrasted).

[15] The British experience with trade monopolies and letters patent for invention was reflected in the American Colonies, Note, *supra*, note 14, at 99-100, where the parallel development of hostility toward trade monopolies led to passage of laws quite similar to the English Statute of Monopolies. B. BUGBEE, *supra* note 14, at 58-61. In 1641, the General Court of Massachusetts Bay approved and adopted the "Body of Liberties," which contained this clause: "9. No monopolies shall be granted or allowed amongst us, but of such new Inventions yt are pfitable to ye Countrie, & yt for a short time." *Id.* at 61. The American hostility toward trade monopolies was aptly demonstrated by the Boston Tea Party, which was in fact a reaction to the East India Company's monopoly on tea. G. FOLD, PATENTS AND INDUSTRIAL PROGRESS 117 (1942). While patents are not technically monopolies in the strictest sense of restraining a formerly free trade, they nevertheless have been classified as monopolies since their inception. A. DELLER, *supra* note 14, § 634 at 139. "The exclusive character of both monopolies and patents of invention, and the elaborate common procedure by which both were granted, notably in England, encouraged this confusion." B. BUGBEE, *supra* note 14, at 14. The regulation of monopolization in this country has had a great effect on federal patent law. *See* O. BARNETT, PATENT PROPERTY AND THE ANTI-MONOPOLY LAWS (1943); W. BOWMAN, PATENT AND ANTITRUST LAW (1973); G. Keating, *The Patent Monopoly Versus Anti-Trust Activism—Open Warfare or Armed Truce?*, 77 DICK. L. REV. 1, 1-4 (1979). As was the case in England, letters patent for invention were expressly saved from the operation of these anti-monopoly laws. *See* note 14 *supra*. In due course the issuance of inventors' patents by the colonial governments became so common, B. BUGBEE, *supra* note 14, at 62-83, that when the Constitutional Convention met it passed the clause securing inventors' rights without opposition. The grant of patents by legislative authority rather than by the Crown was the major difference between the colonial and English systems.

[16] Prager, *Trends and Developments in American Patent Law from Jefferson to Clifford (1790-1870)* (pt. 2) 6 AM. J.L. HIST. 45, 45 (1962). The Act of 1790 confirmed certain fundamental principles of patent law that are still applicable today: (1) the device shall be new and useful; (2) the device shall be the work of the original and first inventor; (3) the monopoly is limited and its issuance is conditioned on detailed disclosure to the Patent Office; (4) the monopoly consists in the right to exclude other persons from utilizing the invention or, if the inventor so chooses, to sell the invention or license its use; (5) the patentee may enforce his patent against infringement in federal court. C. BIESTERFELD, PATENT LAW 2 (2d ed. 1949). In 1952, the standard of "non-obviousness"

purposes and policies of the federal patent system have remained the same:[17] to encourage invention by rewarding the inventor with a limited monopoly; to further the public interest by disclosure of the invention's design; and to ensure that only worthy inventions receive patents.[18]

The second system of inventors' protection is state trade secret law[19] derived from common law principles of contract[20] and the law of

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was added to "new" and "useful" as patent criteria. Patent Act of 1952, Pub. L. No. 593, 66 Stat. 792 (codified at 35 U.S.C. § 103 (1976)). In the American patent system, an inventor is not compelled to license his invention; he may obtain the patent and refrain from exploiting it. 35 U.S.C. § 261 (1976).

[17] *See* C. BIESTERFELD, *supra* note 16, at 2-3.

[18] Kewanee Oil Corp. v. Bicron Corp., 416 U.S. 470, 472-93 (1973). The corollary of the last-mentioned policy is that patents issued on inventions not meriting patent protection should be invalidated. *See, e.g.*, Lear, Inc. v. Adkins, 395 U.S. 653, 655-82 (1969) (if company could prove patent's invalidity, it could avoid payment to the inventor of all royalties accruing after issuance of the patent).

[19] "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." RESTATEMENT OF TORTS § 757, comment b (1939). *See* A.O. Smith Corp. v. Petroleum Iron Works Corp., 73 F.2d 531 (6th Cir. 1934) (production processes); S.W. Scott & Co. v. Scott, 186 App. Div. 518, 174 N.Y.S. 583 (1919) (customer lists); Pressed Steel Car Co. v. Standard Steel Car Co., 210 Pa. 464, 60 A. 4 (1904) (blueprints); R. MILGRIM, TRADE SECRETS § 2.09 (1977) (business procedures and advertising plans may be trade secrets). The origin of American trade secret protection is found in England where the practice of exploiting trade secrets existed prior to the development of letters patent for invention. Orenbuch, *Trade Secrets and the Patent Laws*, 52 J. PAT. OFF. SOC'Y 638, 638 (1970). Under the English common law, the owner of a trade secret could obtain protection against those who, having learned the secret from him, sought to use it in ways which would be inconsistent with the terms on which it was disclosed. 87 HARV. L. REV. 807, 810 (1974). *See, e.g.*, Morrison v. Moat, 9 Hare 241, 20 L.J. Ch. 513 (1851) (divulging pharmaceutical trade secrets in violation of prior secrecy agreement enjoined).

[20] 12 HOUS. L. REV. 191, 192 (1974). Contract law may be involved in trade secret protection in a variety of ways. The courts have enforced contractual restrictions on the right of employees to divulge trade secrets. *See, e.g.*, Becher v. Contoure Labs., 279 U.S. 388, 391 (1929); Certified Labs., Inc. v. Robinson, 303 F. Supp. 1014, 1024-25 (E.D. Pa. 1969); R. MILGRIM, *supra* note 19, at § 3.05. The courts have also found implied contracts not to divulge trade secrets. *E.g.*, Alley Mfg. Co. v. Loika, 145 Conn. 509, 514, 144 A.2d 306, 309 (1958). Contract law also governs the licensing or sale of trade secrets. *See, e.g.*, Mulkens & Kropff, Inc. v. Ferd. Muelhens, Inc., 43 F.2d 937, 938 (2d Cir. 1930) (owner of trade secret may retain title to his secret while licensing its use). Under contract law, trade secret license agreements remain enforceable even after the secret becomes known through manufacture, if continued public secrecy was not a condition of the contract. Sandlin v. Johnson, 141 F.2d 660, 661 (8th Cir. 1944); Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655, 661-67 (S.D.N.Y. 1959), *aff'd mem.*, 280 F.2d 197 (2d Cir. 1960); Sinclair v. Aquarius Elec., Inc., 42 Cal. App. 3d

unfair competition.[21] The trade secret system is one preventing a wrongful breach of confidence by a person in privity with the inventor.[22] This protection is narrow because the inventor cannot hinder a third party from independently discovering and exploiting the same device;[23] nor can he prevent the third party from discovering the device through "reverse engineering."[24]

Because of these different levels of protection the two systems have coexisted in the United States without major objections by Congress or the courts.[25] Despite a few isolated instances of conflict,[26] the

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216, 218-19, 116 Cal. Rptr. 654, 655-67 (1974).

[21] *E.g.*, DuPont Powder Co. v. Masland, 244 U.S. 100, 104 (1917). Historically, the protection of trade secrets was founded on the tort law of unfair competition. H. NIMS, THE LAW OF UNFAIR COMPETITION AND TRADEMARKS §§ 141-61 (4th ed. 1947). The issue of whether there existed property rights in trade secrets has long been debated. However, in emphasizing the tort aspects, Justice Holmes remarked:

> Whether the plaintiffs have any valuable secret or not the defendant knows the facts, whatever they are, through a special confidence that he accepted. The property may be denied but the confidence cannot be. Therefore the starting point for the present matter is not property or due process of law, but that the defendant stood in confidential relations with the plaintiffs, or one of them.

DuPont Powder Co. v. Masland, 244 U.S. at 104. Although courts stress the existence of confidential relationships they nonetheless refuse to enforce the confidential relationship unless the defendant's information has a special character which distinguishes it from common knowledge. Aetna Bldg. Maintenance Co. v. West, 39 Cal. 2d 158, 159, 246 P.2d 11, 12 (1950); National Starch Prod., Inc. v. Polymer Indus., Inc., 273 App. Div. 732, 79 N.Y.S.2d 357, 358 (1948). Agreements which attempt to derive trade secrets from technological information that is already in the public domain have been held to be in restraint of trade. *See* Ridley v. Krout, 63 Wyo. 252, 254, 180 P.2d 124, 126 (1947) (review of decisions on point); Orenbuch, *supra* note 19, at 654.

[22] H. NIMS, *supra* note 21, § 142; 87 HARV. L. REV. 807, 810 (1974); 12 HOUS. L. REV. 191, 192-93 (1974).

[23] *See, e.g.*, Northern Petrochem. Co. v. Tomlinson, 484 F.2d 1057, 1060 (7th Cir. 1973) (courts will not protect secret independently discovered); Hampton v. Blair Mfg. Co., 374 F.2d 969, 972 (8th Cir.) (same), *cert. denied*, 389 U.S. 829 (1967); Giblett v. Reed, 9 Mod. 459 (1743) (recognized right to discover trade secret independently). *See generally* H. NIMS, *supra* note 21, at § 148.

[24] Reverse engineering is the analysis of a product to discover its components or production process. 87 HARV. L. REV. 807, 809 (1974). These guiding principles of the English common law were adopted in the United States and applied by the courts to protect owners of trade secrets. *E.g.*, Peabody v. Norfolk, 98 Mass. 452 (1868) (employee enjoined from revealing textile manufacturing trade secrets). Thus, the patent system offers a greater scope of protection because the inventor can obtain the restraints against independent discovery and "reverse engineering" by third parties which are lacking in trade secret protection. *Cf.* 20 VILL. L. REV. 225, 229 (1974) (courts have recognized these inherent frailties of protectable trade secrets).

[25] 20 VILL. L. REV. 225, 227 (1974); *see, e.g.*, Universal Oil Co. v. Globe Oil & Ref.

viability of trade secret law separate and distinct from patent law had not until 1964 been questioned.[27] The emergence of a federal patent preemption doctrine[28] as such began in that year with the companion cases of *Sears, Roebuck & Co. v. Stiffel Co.*[29] and *Compco Corp. v. Day-Brite Lighting, Inc.*[30] In *Sears*,[31] Stiffel Co. had manufactured a pole lamp for which it received a patent.[32] Sears manufactured a substantially identical copy of the lamp prompting Stiffel to sue in federal district court for patent infringement and unfair competition.[33] Though the patent was found to be invalid Sears was enjoined from copying the lamp under the Illinois law of unfair competition.[34] The Supreme Court reversed, holding that a state may not under any law forbid the copying of an article in the public domain; the Court reasoned that such a restriction conflicted with the purpose and policy of the federal patent laws.[35] The *Sears* opinion, though written in broad

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Co., 322 U.S. 471, 484 (1944); Becher v. Contoure Labs., 279 U.S. 388, 391 (1929).

[26] *E.g.*, Scott Paper Co. v. Marcalus Mfg. Co., 326 U.S. 249, 251 (1945); Morton Salt Co. v. G.S. Suppiger Co., 314 U.S. 488, 492 (1942); Kellogg Co. v. National Biscuit Co., 305 U.S. 111, 113 (1938); Singer Mfg. Co. v. June Mfg. Co., 163 U.S. 169, 173 (1896); Coats v. Merric Thread, 149 U.S. 562, 563 (1893). These cases did not use the language of preemption. *See* Treece, *Patent Policy and Preemption: The Stiffel and Compco Cases*, 32 U. CHI. L. REV. 80, 84-85 (1964).

[27] *See* Milgrim, *Sears to Lear to Painton: Of Whales and Other Matters*, 46 N.Y.U.L. REV. 17 (1971).

[28] Under traditional preemption doctrine a congressional purpose to preempt state law can be found whenever state policy produces a result inconsistent with federal policy objectives. Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). The criteria for determining such congressional purpose are: (1) the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it; (2) the federal interest is so dominant that it can be assumed that Congress intended to preclude enforcement of state law concerning the same subject; and (3) the federal laws themselves express a purpose to displace state law. *See* Pennsylvania v. Nelson, 350 U.S. 497, 502-05 (1956) (Pennsylvania Sedition Act preempted by Smith Act of 1940); Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (federal Alien Registration Act preempts Pennylvania Registration Act).

[29] 376 U.S. 225, 231 (1964).

[30] 376 U.S. 234, 236 (1964). The preemption doctrine was first delineated in *Sears* and *Compco*. 87 HARV. L. REV. 807, 814 (1974).

[31] *Compco* was virtually identical with *Sears* in its facts, reasoning and holding. 87 HARV. L. REV. 807, 814 (1974).

[32] 376 U.S. at 225-26.

[33] Suit was brought in the Northern District of Illinois. The district court's opinion was not officially reported. *Id.* at 225.

[34] The district court's holding was affirmed by the Seventh Circuit. Sears, Roebuck & Co. v. Stiffel Co., 313 F.2d 115, 117-18 (7th Cir. 1963), *rev'd*, 376 U.S. 234 (1964).

[35] 376 U.S. at 230-33.

preemptive terms,[36] was essentially at odds only with the particular area of unfair competition law making it a tort for someone to copy another's product and "palm it off" as his own.[37] Viewed in this light the holding in *Sears* was consistent with the remaining bulk of unfair competition law of which trade secret principles were a part.[38] Nevertheless the broad dictum in *Sears*[39] cast doubt on the ability of the states to continue to provide a local system of protection[40] in the face of the strong federal patent policy that apparently had been adopted.[41] Shortly after *Sears*, the Court ruled in *Brulotte v. Thys Co.*[42] that a contract for royalties on a patented article may not extend beyond the patent term.[43] This decision was grounded in the previously established patent misuse doctrine which prohibited a patentee from attempting to secure a partial or limited monopoly on unpatentable goods through its licensing agreements.[44] However, by holding such

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[36] Justice Black delivered the opinion of the Court:

> Thus the patent system is one in which uniform federal standards are carefully used to promote invention while at the same time preserving free competition. Obviously a state could not, consistently with the Supremacy Clause of the Constitution, extend the life of a patent beyond its expiration date or give a patent on an article which lacked the level of invention required for federal patents. To do either would run counter to the policy of Congress of granting patents only to true inventions, and then only for a limited time. Just as a state cannot encroach upon the federal patent laws directly, it cannot under some other law, such as that forbidding unfair competition, give protection of a kind that clashes with the objectives of the federal patent laws.

376 U.S. at 231.

[37] The Court acknowledged that statutes prohibiting "palming off" another's product as one's own might remain valid. *Id.* at 232. The Illinois statute, on the other hand, prevented copying irrespective of "palming off." *Id.* at 227. *See* H. NIMS, *supra* note 21, at § 9a ("palming off" discussed); Milgrim, *supra* note 27, at 19.

[38] *See* Milgrim, *supra* note 27, at 19.

[39] Of particular concern to proponents of trade secret protection was the Court's statement that "[a]n unpatentable article, like an article on which the patent has expired, is in the public domain and may be made and sold by whoever chooses to do so." 376 U.S. at 231. This statement was criticized as erroneous, and contradictory to established patent and trade secret law. *See, e.g.*, Milgrim, *supra* note 27, at 19.

[40] *See, e.g.*, Adelman, *Trade Secrets and Federal Preemption—The Aftermath of Sears and Compco*, 49 J. PAT. OFF. SOC'Y 714, 732-33 (1967) (preemption of trade secrets predicted); Handler, *Product Stimulation: A Right or a Wrong?*, 64 COLUM. L. REV. 1183, 1185-86 (1964) (no preclusion of state protection predicted). *See generally* Comment, *The Stiffel Doctrine and the Law of Trade Secrets*, 62 NW. U.L. REV. 956, 958-60 (1968).

[41] *See* 20 VILL. L. REV. 225, 230 (1974) (strong federal policy adopted in *Sears* and *Compco*).

[42] 379 U.S. 29 (1964).

[43] *Id.* at 30-31.

[44] Mahon, *Patent Misuse: Licensing and the Control of Unpatented Articles*, 51 J.

post-expiration royalties illegal,[45] the Court in *Brulotte* further evidenced its pursuit of a comprehensive federal policy in patent law.[46]

Another landmark case in the development of the preemption doctrine was *Lear, Inc. v. Adkins*.[47] Lear, the licensee of Adkins' invention, repudiated the contract while the patent application was still pending.[48] After the California Supreme Court ruled in Adkins' favor,[49] the United States Supreme Court granted certiorari and rejected the California court's use of the licensee estoppel doctrine.[50] Under this doctrine,[51] a licensee is estopped from asserting that his licensor's patent is invalid.[52] The Court concluded that "unmuzzling" the licensee would be in the public interest because numerous worthless patents would be thereby invalidated.[53] To encourage the testing of patent validity, the Court maintained that a licensee must be allowed to escape liability for royalties during the period between the grant of the patent and final determination of the patent's validity.[54] The Court expressly reserved for future consideration the enforceability of contractual royalty obligations for unpatented secret ideas.[55] However, the *Lear* lan-

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PAT. OFF. SOC'Y 409, 409 (1969). *See also* R. ELLIS, PATENT LICENSES, §§ 464-76 (A. Deller ed. 1958) (restraints of anti-monopoly statutes and doctrines enunciated in court decisions); CURRENT TRENDS IN DOMESTIC AND INTERNATIONAL LICENSING, 173-285 (T. Arnold ed. 1977) (overview of U.S. antitrust and misuse laws for licensors and licensees).

[45] 379 U.S. at 32.

[46] The language in the *Brulotte* decision was somewhat more cautious than the language in *Sears*. Yet the Court took the opportunity to review favorably some of the cases, *see* note 26 *supra*, that foreshadowed the preemption doctrine. 379 U.S. at 31-32.

[47] 395 U.S. 653 (1969).

[48] *Id.* at 655-60.

[49] 67 Cal. 2d 882, 435 P.2d 321, 64 Cal. Rptr. 554 (1967).

[50] 395 U.S. at 661-71. As the Court noted, the estoppel doctrine had been losing force for many years. *Id.* at 664-68.

[51] *Id.* at 670.

[52] Automatic Radio Mfg. Co. v. Hazeltine Research, Inc., 339 U.S. 827 (1950). *See* 4 A. DELLER, *supra* note 14, at § 403 (licensee estoppel discussed); 45 N.Y.U.L. REV. 386, 386-99 (1970) (doctrine of licensee estoppel overruled in *Lear*); 63 YALE L.J. 125, 125-31 (1953) (the doctrine of licensee repudiation in patent law).

[53] 395 U.S. at 670. *See* McCarthy, *"Unmuzzling" the Patent Licensee: Chaos in the Wake of Lear v. Adkins*, 45 GEO. WASH. L. REV. 429, 429-32 (1977).

[54] 395 U.S. at 674. Naturally, if the patent were found valid the licensee would be liable for all royalties. *Id.* For a discussion of the differing interpretations accorded the *Lear* doctine, see 21 KAN. L. REV. 247, 247-52 (1973). *See also* Blonder-Tongue Lab., Inc. v. University of Ill. Foun., 402 U.S. 313, 342 (1971); Troxel Mfg. v. Schwinn Bicycle Co., 334 F. Supp. 1269, 1271 (W.D. Tenn. 1971), *rev'd*, 465 F.2d 1253, 1253-56 (6th Cir. 1972).

[55] 395 U.S. at 674-75. Justice White's concurrence questioned the propriety of raising the issue concerning royalties for unpatented ideas, since the matter of state trade secret protection was not before the Court. *Id.* at 677-79.

guage[56] created concern that state protection of unpatented ideas was in jeopardy.[57] This concern was in part prompted by Justice Black's dissent,[58] which indicated his belief that enforcement of trade secret royalty contracts would conflict with patent policy.[59] Justice Black's opinion was endorsed by a federal district court in *Painton & Co. v. Bourns, Inc.*,[60] in which it was held that state trade secret protection was preempted by federal patent policy.[61] However, on appeal, Judge Friendly of the Second Circuit reversed the district court's judgment[62] in an opinion that received acclaim for putting the matter of patent preemption into proper perspective.[63]

Soon after the Second Circuit concluded that state trade secret protection was not preempted, the Supreme Court addressed the preemption doctrine in a copyright case, *Goldstein v. California*.[64] The issue in *Goldstein* was whether a California criminal statute forbidding the piracy of recorded performances contravened federal copyright law, which excluded sound recordings from its categories of properly copyrighted materials.[65] Chief Justice Burger, writing for the Court, held

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[56] Adkins argued that Lear should be liable for all royalties accruing prior to and subsequent to patent issuance, regardless of validity, since Lear had derived special benefits from early use of the product. *Id.* at 672. Justice Harlan characterized this position as "extreme," reasoning that the equities in Adkins' favor did not justify "such a substantial impairment of overriding federal policy." *Id.* The Court concluded, "[t]he parties' contract . . . is no more controlling on this issue than is the State's doctrine of estoppel, which is also rooted in contract policies. The decisive question is whether overriding federal policies would be significantly frustrated . . . ." *Id.* at 673.

[57] *Cf.* 20 VILL. L. REV. 225, 231 (1974) (uncertain application of *Lear* doctrine in lower courts).

[58] 395 U.S. at 676-77 (Black, J., concurring and dissenting).

[59] *Id.* This opinion was criticized as an unwarranted extension of the *Sears* doctrine. *See* Milgrim, *supra* note 27, at 25.

[60] 309 F. Supp. 271, 274 (S.D.N.Y. 1970). The court held that "federal patent law requires an inventor to submit his ideas to the Patent Office before he can compel consideration for the use of his idea." *Id.*

[61] *Id.*

[62] 422 F.2d 216 (2d Cir. 1971). Judge Friendly stated:

> An agreement licensing a trade secret is an altogether different matter [from the situations in *Sears* and *Lear*]. It binds no one except the licensee; all others are free, as the licensee previously was, to attempt by fair means to figure out what the secret is, and, if they succeed, to practice it.

Id. at 223.

[63] *See* Williams, *Trade Secrets and Perpetual Royalties: How Long Can You Collect?*, 60 J. PAT. OFF. SOC'Y 442, 445 (1978) (Judge Friendly's opinion characterized as brilliantly reasoned); 17 VILL. L. REV. 376, 376-79 (1971) (discussion of *Painton*).

[64] 412 U.S. 546 (1973).

[65] *Id.* at 548-49.

that neither the Constitution nor federal law expressly prohibited state protection in this area.[66] The Chief Justice reasoned that state protection of literary works would not necessarily conflict with federal law.[67] Because much of the opinion in *Goldstein* addressed itself to the authors' and inventors' clause of the Constitution,[68] it intimated the Burger Court's favorable attitude toward state protection and seemed to signal a reversal of the preemptive trend.[69] Drawing on the prior decisions in *Goldstein* and *Painton*,[70] the Supreme Court held in *Kewanee Oil Co. v. Bicron Corp.*[71] that state trade secret protection was not precluded by federal patent law.[72] The Court found that the objectives of the two systems of protection were compatible, since both seek to promote invention.[73] The Court found that the only area of potential conflict was between the secrecy permitted under state law and patent law's policy of disclosure.[74] However, the Court discounted the probability that actual problems would arise, reasoning that most inventors of patentable matter would prefer to secure a patent rather

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[66] Since the subject matter to which the Copyright Clause is addressed may thus be of purely local importance and not worthy of national attention or protection, we cannot discern such an unyielding national interest as to require an inference that state power to grant copyrights has been relinquished to exclusive federal control.

Id. at 558.

[67] *Id.* at 570.

[68] "While the area in which Congress may act is broad, the enabling provision of Clause 8 does not require that Congress act in regard to all categories of materials which meet the constitutional definition." *Id.* at 562. The Court in *Goldstein* expressed the view that the standards of patentability established by Congress in patent law gave rise to conflicts, while no such conflict existed with musical recordings in the copyright area. *Id.* at 569-70. This "Congressional standards" line of analysis was later dropped by the Chief Justice, who turned to the "spirit" of *Goldstein* instead. Goldstein, *Kewanee Oil Co. v. Bicron Corp.: Notes on a Closing Circle*, 1974 SUP. CT. REV. 81, 88.

[69] Wydick, *Trade Secrets: Federal Preemption in Light of Goldstein and Kewanee*, 56 J. PAT. OFF. SOC'Y 4, 11 (1974) (pt. 2).

[70] Goldstein, *supra* note 68, at 88-89.

[71] 416 U.S. 470 (1974). In *Kewanee*, a company sought to enjoin former employees from divulging trade secrets concerning ionization crystals. The Sixth Circuit reversed the district court's permanent injunction against the defendants, holding that trade secret protection was preempted. 478 F.2d 1074, 1076 (6th Cir. 1973). The United States Supreme Court granted certiorari to resolve a conflict among the circuits concerning the trade secret preemption question. 416 U.S. at 472.

[72] 416 U.S. at 489-92.

[73] "Certainly the patent policy of encouraging invention is not disturbed by the existence of another form of incentive to invention. In this respect the two systems are not and never would be in conflict." *Id.* at 484.

[74] "The more difficult objective of the patent law to reconcile with trade secret law is that of disclosure, the quid pro quo of the right to exclude." *Id.*

than take the risks inherent in trade secret protection.[75] The Court also concluded that if trade secret licensing contracts were deemed unenforceable, inventors of useful but doubtfully patentable material would be forced to hoard their ideas, depriving the public of their use.[76] The decision in *Kewanee* was extolled for its unequivocal endorsement of state systems of protection.[77]

In the instant case, the Court noted that since the licensing contract expressly provided for royalty obligations in the event no patent issued, and since the licensee had derived economic benefits from exploiting the device even though no patent issued, the disputed contract was clearly independent of federal patent law.[78] The Court also stated that since the product was on the market and since the public was free to copy it, enforcement of the contract did not withdraw any idea formerly in the public domain so as to violate federal policy outlined in prior Supreme Court decisions.[79] The Court emphasized that since an enforceable licensing agreement provides incentives to the inventor to exploit his creation and since such exploitation was accomplished by licensing its manufacture, the federal patent policies of encouraging invention and public disclosure of inventions are furthered by agreements of this nature.[80]

The Supreme Court should be commended for reversing the Eighth Circuit's[81] determination that federal patent policies rendered

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[75] The Court paid tribute to Judge Friendly's analysis in *Painton* discussing this issue. *Id.* at 484. In a concurring opinion, Justice Marshall disagreed that it was only a "remote possibility" that an inventor of patentable material would prefer trade secret protection to federal patent protection. However, he reconciled the disclosure policy conflict by reasoning that the policy of disclosure existed solely within the context of the patent contract between the inventor and the federal government. Justice Marshall further noted that Congress had never expressed any disapproval of the trade secret system during the many years it coexisted with federal protection. *Id.* at 493-94. *See* Adelman & Jaress, *Inventions and the Law of Trade Secrets After Lear v. Adkins*, 16 WAYNE L. REV. 77, 84 (1969) (discussion of partial preemption of patentable trade secrets); 87 HARV. L. REV. 807, 829-34 (1974) (suggesting partial preemption of trade secrets that meet established judicial standards of patentability).

[76] 416 U.S. at 486. *See generally* CURRENT TRENDS IN DOMESTIC AND INTERNATIONAL LICENSING, 153-72 (T. Arnold ed. 1977) (comparison of trade secrets and patents in licensing context).

[77] *See, e.g.*, Goldstein, *supra* note 68, at 95; Wydick, *supra* note 69, at 29. *But see* 12 HOUS. L. REV. 191, 199 (1974) (*Kewanee* should have distinguished *Sears* and *Compco*).

[78] Aronson v. Quick Point Pencil Co., 99 S. Ct. 1096, 1099 (1979).

[79] *Id.*

[80] *Id.* at 1101.

[81] 567 F.2d 757 (8th Cir. 1978).

unenforceable the licensing contract in *Quick Point.*[82] The Court's conclusion that the agreement was not governed by patent policies[83] should discourage the lower courts from invoking patent criteria[84] where, as in *Quick Point,* the contract concerns an unpatented device. Similarly, the finding by the Court that *Sears,*[85] *Compco,*[86] and *Lear*[87] were inapplicable to the contract[88] in *Quick Point* should provide the lower courts with a more thorough understanding of the scope of those decisions. The instant case demonstrates the consistency between trade secret principles and the actual holding in *Sears.*[89] As to *Lear,* it is apparent from an analysis of the Court's opinion in *Quick Point* that neither the dictum of *Lear* nor Justice Black's dissent will continue to carry much weight.[90] Rather, *Lear's* preemption doctrine will be restricted to its abolition of licensee estoppel and to furthering a federal policy that protects the public by encouraging the invalidation of worthless patents.[91]

The instant decision indicates that the Court has properly embraced the view that the public needs no such protection where a manufactured device receives no patent.[92] Thus, *Quick Point's* operative force revolves around the sound premise first enunciated in *Kewanee:*[93] where trade secret protection is absent, an inventor of unpatentable but useful products has little incentive to market his product even though it may prove to be beneficial to the public.[94] Using this premise

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[82] *Id.* at 762.

[83] 99 S. Ct. at 1099.

[84] "[P]ublic policy is a very unruly horse, and when once you get astride it, you never know where it will carry you." Painton & Co. v. Bourns, Inc., 442 F.2d 216, 225 (2d Cir. 1971) (quoting Richardson v. Mellish, 2 Bing. 229, 252 (1824)).

[85] 376 U.S. 225 (1964).

[86] 376 U.S. 234 (1964).

[87] 395 U.S. 653 (1969).

[88] 99 S. Ct. at 1099-1100.

[89] *Id.* at 1099-1101. As noted by the Court, though Quick Point gave up the right to copy the keyholder, the company's profits reflected the value it received for being the first to market the product. This observation refuted the notion that the *Sears* case applied to *Quick Point,* since in the latter case no idea was withdrawn from the public domain. *Id.*

[90] The opinion in *Quick Point* completely ignored the dictum in *Lear* and Justice Black's dissent in that case. *See id.*

[91] 99 S. Ct. at 1100 (citing *Lear*).

[92] *Id.*

[93] 416 U.S. 470, 472-93 (1974).

[94] "Enforcement of these contractual obligations, freely undertaken in arm's length negotiation and with no fixed reliance on a patent or a probable patent grant, will: 'encourage invention in areas where patent law does not reach, and will prompt the inde-

as a guide the Court wisely brushed aside the collateral argument that providing such protection discourages recourse to the patent system.[95] However, in refuting that contention the Court did not mention the argument's most obvious flaw, namely, that it should not be federal policy to encourage inventors of unpatentable material to burden the Patent Office with frivolous applications.[96] At the core of the decision, therefore, is the conclusion that but for trade secret protection many useful but unpatentable devices would never reach the public.[97]

Having thus concluded that enforcement of the contract was not preempted by federal policy, the Court next dealt with the interesting question of whether the particular structure of the Quick Point contract had been achieved through patent application misuse on the part of the inventor.[98] In handling this issue the Court correctly recognized that the parties to such arrangements weigh a great many factors in licensing negotiations.[99] Although Justice Blackmun's concurrence expressed a different perception of the amount of leverage exerted by a patent application,[100] both his opinion and that of the majority readily agreed that federal policy in no way justified excusing Quick Point from its explicit contractual obligations.[101] In analyzing this portion of the decision it is apparent that the Court, by holding the company to its contractual obligations, placed great reliance on Quick Point's status as a sophisticated party.[102] In this respect the Court was undoubtedly correct. A worldly-wise party such as Quick Point knows that if no patent issues its competitors will be free to copy the manufactured device.[103] In the instant case, that factor apparently was outweighed by Quick Point's estimation that the economic advantage to be gained by

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pendent innovator to proceed with the discovery and exploitation of his invention. Competition is fostered and the public is not deprived of the use of valuable, if not quite patentable, inventions.' " 99 S. Ct. at 1101 (quoting Kewanee Oil Co. v. Bicron Corp., 416 U.S. at 485).

[95] 99 S. Ct. at 1101.

[96] 416 U.S. at 483.

[97] 99 S. Ct. at 1099-1100.

[98] *Id.* at 1101-02.

[99] *Id.*

[100] *Id.* at 1101-02 (Blackmun, J., concurring).

[101] *Id.*

[102] *Id.*

[103] Since a prospective trade secret licensee knows that his licensor cannot protect him from independent developers, he weighs the value of disclosure against the risks of relying on matter which is subject to third-party royalty-free use. Whether articulated or not, such balancing is the stuff that leads to hard negotiating for royalty rate and duration.

R. MILGRIM, *supra* note 19, at § 6.05[2][d].

preempting the market would far exceed the disadvantage of paying perpetual royalties.[104] Had Quick Point desired that royalties continue only so long as no one else copied the keyholder it could have bargained accordingly.[105]

There are numerous other reasons, in addition to those enunciated by the Court, for enforcing this type of contract. For example, enforcing an unambiguous agreement providing for royalties beyond the period of secrecy will discourage unethical business practices.[106] If a licensee knew the royalty agreement would be unenforceable after such time as the article was copied by others, he would have an incentive to disclose the idea to his competitors in order to be relieved of his own obligations.[107] This practice would in turn force inventors to demand exorbitant lump-sum payments for initial disclosure, instead of negotiating long term contracts at reduced royalty rates.[108] Potential problems such as these can be avoided in the future by following the Court's reasoned approach of respecting and enforcing the terms of the parties' licensing agreement.[109]

In assessing the impact of *Quick Point* as a whole it is clear that the Court, building on *Kewanee,* has tried to limit the concept of federal patent preemption.[110] As in *Kewanee,* the Court in *Quick Point* adhered to established patent and trade secret principles while also

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[104] The Court characterized Quick Point as "an experienced novelty manufacturer." 99 S. Ct. at 1101.

[105] "Quick Point had the opportunity to assess its risks and took a gamble and has called upon the court for relief because it did not like the result." Quick Point Pencil Co. v. Aronson, 567 F.2d 757, 767 (8th Cir. 1977) (Larsen, J., dissenting), *rev'd,* 99 S. Ct. 1096 (1979).

[106] Williams, *supra* note 63, at 445.

[107] *Id.*

[108] *Id.*

[109] Perhaps the most curious aspect of the Supreme Court's decision in *Quick Point* was its failure to cite one case of immense precedential value: Warner-Lambert Pharmaceutical Co. v. John J. Reynolds, Inc., 178 F. Supp. 655, 661-67 (S.D.N.Y. 1959), *aff'd mem.*, 280 F.2d 197 (2d Cir. 1960). The Eighth Circuit characterized *Warner-Lambert* as "virtually on all fours" with *Quick Point.* Quick Point Pencil Co. v. Aronson, 567 F.2d at 763 (Larsen, J., dissenting). In *Warner-Lambert* a manufacturer agreed to make payments to the discoverer of "Listerine" for as long as it continued to manufacture the product. The secret formula became known to the public, but the manufacturer continued paying royalties for 25 years thereafter. At that time the plaintiff sought a declaratory judgment that it was no longer obligated to pay royalties. The court found the agreement unambiguous and determined that conveyance of the formula alone furnished the consideration. The court refused to assume that the parties bargained for continued secrecy, reasoning that had the parties wished the royalties to cease when the formula became known or copied they could have provided so. 178 F. Supp. at 661-67.

[110] *See* Goldstein, *supra* note 68, at 88.

scrutinizing the economic interaction between the two systems of protection.[111] Reviewing the history of the patent preemption doctrine, the decisions in *Goldstein,*[112] *Kewanee,* and *Quick Point* became necessary because the Warren Court opened a Pandora's box with its dicta in *Sears* and *Compco.*[113] Therefore it is unclear why to this date the Burger Court has declined to reject expressly some of that dicta,[114] preferring instead to ignore[115] or distinguish it.[116] Nevertheless, the *Kewanee* and *Quick Point* decisions, taken together, have restored perspective to this area of the law and should prove to be useful guides in the future.

Joshua J. Wiener

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[111] *Id.* at 90.

[112] *See* notes 64 through 68 and accompanying text *supra.*

[113] *Cf.* Goldstein, *supra* note 68, at 83 (*Kewanee* necessary because of mistaken reasoning in *Sears*).

[114] *See* Milgrim, *supra* note 27, at 19.

[115] *Cf.* Goldstein, *supra* note 68, at 81 (Burger Court used benign neglect to overcome *Sears*).

[116] *Cf.* Williams, *supra* note 63, at 446 (Court in *Kewanee* should have ignored problem-causing dicta in *Sears, Compco* and *Lear,* rather than try to distinguish it).

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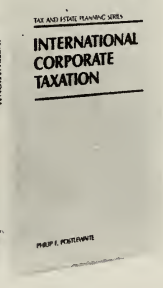

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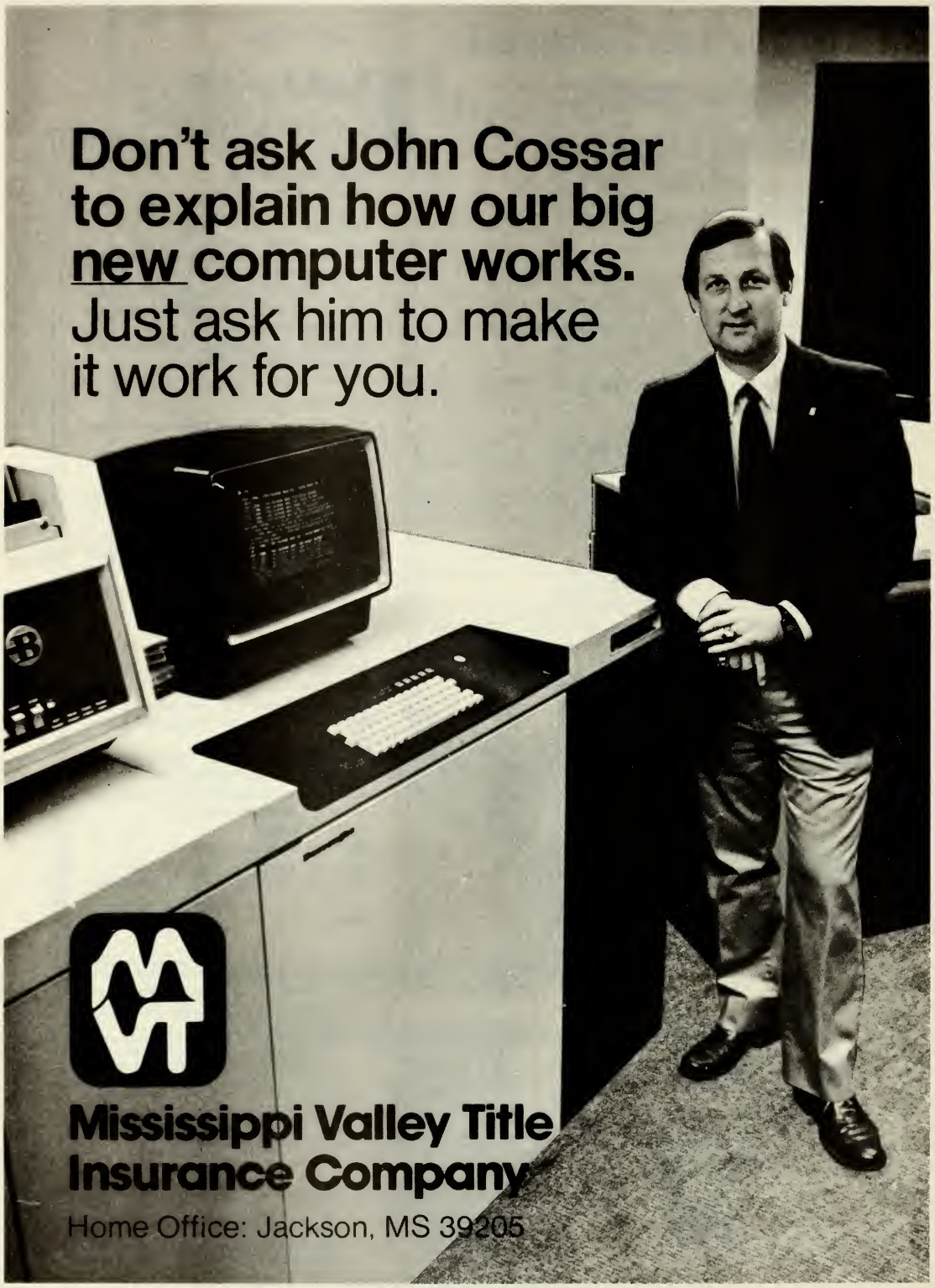
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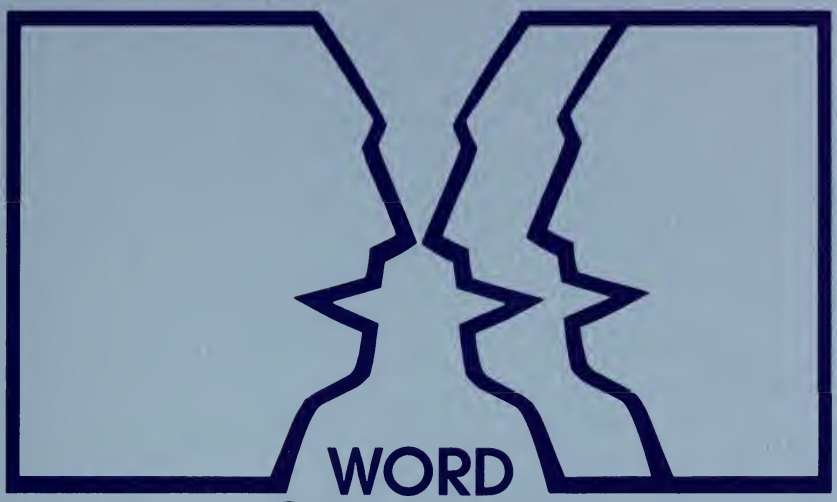

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